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No. 05-

IN THE

Supreme Court of the United States

SANDRA SEEGARS, GARDINE HAILES, ABSALOM F. JORDAN, JR., CARMELA B. BROWN, AND ROBERT N. HEMPHILL,
Petitioners,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, AND ANTHONY A. WILLIAMS, MAYOR, DISTRICT OF COLUMBIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The District of Columbia prohibits the possession of pistols, requires firearms possessed in the home to be unloaded and disabled, and prohibits carrying a pistol in one's dwelling. Petitioners, law-abiding residents of the District, challenged these provisions, which are aggressively enforced, under the Second Amendment to the U.S. Constitution and as beyond the District's statutory authority delegated by Congress. They alleged that, but for these criminal prohibitions, they would forthwith possess pistols in their homes, and would enable their firearms for use and carry them in their homes if threatened by criminal intrusion.

The question is whether plaintiffs alleged sufficient harm, including the threat of arrest and prosecution, to have standing for a pre-enforcement challenge to the District's above criminal prohibitions. This involves two sub-issues. First, does standing exist on the part of persons who will not violate the law unless and until a court invalidates the law, at which time such persons incontestably will forthwith engage in activities the invalidated law proscribes? Second, does standing exist on the part of persons who will violate the law in a dire emergency which may or may not come to pass, but for which a prudent person must take steps to meet?

PARTIES TO PROCEEDING

All parties to the proceeding are identified in the caption and are natural persons. None of the parties are corporations, and hence there is no parent or publicly held company owning 10% or more of the corporation's stock.

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The opinion of the court of appeals, 396 F.3d 1248, is printed in the Appendix ("App.") at 1a. The unreported order denying the petition for rehearing is at App. 12a. The order denying the petition for rehearing *en banc*, with separate statements of Judges Ginsburg, Sentelle, and Williams, is reported at 413 F.3d 1, and is at App. 23a. The unreported order of dismissal by the district court is at App. 32a. The district court's amended memorandum opinion, 297 F. Supp.2d 201, is at App. 32a.

JURISDICTION

On February 8, 2005, the court of appeals rendered judgment affirming in part and reversing in part the judgment of the district court, and rendered an opinion on the same date holding that the plaintiffs did not have standing to bring this action. On June 21, 2005, the court of appeals denied the petition for rehearing and for rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES AND REGULATIONS

The texts of the following are in the Appendix: U.S. Const., Amend. II; 42 U.S.C. § 1981(a); D.C. Code §§ 1-303.43, 7-2502.01, 7-2502.02, 7-2507.02, 7-2507.06, 22-4504, and 22-4515.

STATEMENT OF THE CASE

Introduction

A free people should not have to risk imprisonment to exercise their most fundamental individual rights, including the right to keep and bear arms. The decision below, however, puts the residents of the District of Columbia in just such an untenable position. The D.C. Circuit concluded that Petitioners lacked standing not because it misapplied a legal standard that this Court has clearly articulated. Rather, the court applied this Court's well-established precedents to the fact pattern before it in a way that those precedents do not anticipate.

A plaintiff satisfies the requirements of Article III provided (1) he has suffered an injury in fact, (2) that injury was caused by the defendant's conduct, and (3) the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). An imminent threat of future injury satisfies the injury requirement provided it is not "speculative." *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990) ("Allegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be certainly impending to constitute injury in fact.").

The lower court acknowledged this standard, but concluded that Petitioners could not satisfy it. Petitioner Gardine Hailes has already been victimized once by a burglar in her home. She possesses a registered shotgun, but must keep it bound with a trigger lock under the District of Columbia's laws. If another burglary attempt is made on her house, she stands ready to defend herself with her shotgun. But, according

to Judge Ginsburg, such threat of injury is "highly speculative." App. 27a. How many times must Ms. Hailes be victimized before she will be deemed to have standing? The obvious answer is that once is more than enough, but the court below rejected this conclusion.

As for Petitioners' challenge to the prohibition on pistol possession, the court suggested that there was no standing because the threat of prosecution was not sufficiently imminent and because plaintiffs had an administrative remedy. But residents of D.C. should not have to run the gauntlet of a Byzantine and futile administrative process to ask permission to exercise their constitutional rights. The prospect of a Bureau of Free Speech to which citizens must apply in order to speak, only to be denied in all cases, is unthinkable. The D.C. "registration" process for pistols is just as invalid.

This Court should take this case to vindicate the rights of the petitioners and the thousands of other D.C. residents who seek nothing more than the ability to exercise their constitutionally guaranteed individual right to keep and bear arms.

(i) Proceedings in the Courts Below

Petitioners Sandra Seegars, Gardine Hailes, Absalom F. Jordan, Jr., Carmela B. Brown, and Robert N. Hemphill filed a complaint for declaratory and injunctive relief alleging that provisions of the District of Columbia Code prohibiting possession of pistols and otherwise restricting firearms by law-abiding citizens in their homes violated the Second Amendment to the U.S. Constitution and were not authorized under enabling

legislation passed by Congress. Respondents Alberto Gonzales,[1] Attorney General of the United States, and Anthony A. Williams, Mayor of the District of Columbia, were and are in charge of enforcing these provisions.

The district court had jurisdiction under 28 U.S.C. § 1331. That court found that only plaintiff Hailes had standing, and only to challenge the provision requiring any registered firearm in the home to be unloaded and disabled. App. 61-62a. The court then ruled on the merits that she failed to state a claim upon which relief can be granted and dismissed the complaint. App. 118a.

The court of appeals affirmed in part and reversed in part. It held that none of the plaintiffs had standing to challenge any of the provisions at issue. App. 16a. Circuit Judge Sentelle filed a dissenting opinion. App. 16a. On June 21, 2005, the court of appeals denied the petition for rehearing and rehearing *en banc*. Chief Judge Ginsburg filed a statement concurring in the denial of rehearing *en banc*, Circuit Judge Sentelle filed a statement dissenting in such denial, and Senior Circuit Judge Williams filed a statement explaining his call for rehearing *en banc*. App. 25a.

(ii) Statement of Facts

The District effectively bans possession of handguns by requiring all firearms to be registered, but prohibiting registration of any pistol not registered before 1976. D.C. Code

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[1] John D. Ashcroft, who was Attorney General when this litigation commenced, was succeeded in office by Mr. Gonzales.

§§ 7-2502.01(a), 7-2502.02(a)(4), 7-2507.06 (penalties of one year imprisonment and $1000 fine). Registered firearms kept at home must be unloaded and disassembled or bound by a trigger lock. §§ 7-2507.02, 7-2507.06 (same penalties). Carrying a pistol in one's own dwelling without a license is prohibited. §§ 22-4504(a), 22-4515 (same penalties).[2]

Prosecution for violation of the provisions at issue may be made by the U.S. Attorney,[3] who serves under Respondent Gonzales, or the D.C. Attorney General (formerly Corporation Counsel), which serves under Respondent Williams. Arrests may be made by federal and District law enforcement agencies which serve under respondents.

Petitioners are eligible under federal law to possess firearms.[4] But for D.C. Code § 7-2502.02(a), each would forthwith obtain and register a pistol to keep at home for self protection against a deadly attack by an intruder.[5] Sandra Seegars, who is retired on a disability and is a member of the D.C. Taxicab Commission, resides in a high crime neighborhood and is a crime victim. Carmela B. Brown, a writer and actor, resides in a high crime neighborhood rife with open-air drug

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[2] Carry licenses are not obtainable. *Bsharah v. United States*, 646 A.2d 993, 646 A.2d at 996 n.12 (D.C. 1994).

[3] Attorney General's Motion to Dismiss at 6 & n.1; *Copening v. United States*, 353 A.2d 305, 307 n.2 (D.C. 1976).

[4] *See* 18 U.S.C. §§ 922(g) (persons ineligible to possess firearms), 922(t) (requiring background checks on persons who receive firearms).

[5] Factual allegations refer to the complaint, which must be taken as true in a motion to dismiss. Pertinent allegations are in the Joint Appendix in the court below, at 15-17.

trafficking and prostitution. Plaintiff Robert N. Hemphill is a retired postman.

Petitioner Absalom F. Jordan, Jr., an Advisory Neighborhood Commissioner and an NRA Certified Firearms Instructor, is a victim of attempted armed robbery and is involved in efforts to expel drug dealers from his neighborhood. He lawfully owns a pistol which he stores outside the District and which, but for D.C. Code § 7-2502.02(a), he would forthwith register and keep at his residence for self protection.

Petitioner Gardine Hailes, an officer manager, is a victim of burglary at her home. She possesses a registered shotgun which she keeps bound by a trigger lock. But for D.C. Code § 7-2507.02, she would remove the trigger lock when she deems it necessary to defend herself in her home under urgent circumstances.

Petitioners face arrest, prosecution, and incarceration should they violate the above provisions. But for those provisions and the enforcement thereof by Respondents, they would forthwith obtain and possess pistols and keep firearms in usable condition when necessary for security. As a proximate cause of the provisions and their enforcement, Petitioners are subjected to irreparable harm.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE D.C. CIRCUIT AND THE SIXTH CIRCUIT ON THE LEVEL OF THREAT NECESSARY FOR STANDING FOR PRE-ENFORCEMENT REVIEW OF A CRIMINAL PROHIBITION, AND TO SETTLE WHETHER THE STANDING DOCTRINE SET FORTH IN *BABBITT V. UNITED FARM WORKERS NATIONAL UNION*, 442 U.S. 289 (1979), APPLIES TO NON-FIRST AMENDMENT CASES

The decision at bar conflicts with decisions of another United States court of appeals on the level of threat necessary for pre-enforcement review of a criminal prohibition. As stated in the instant decision, the Sixth Circuit's decision in *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522, 528-29 (6th Cir. 1998) ("*PRO*"), "is plainly inconsistent with" *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997), which the decision at bar follows. App. 14a.

In addition, the court of appeals decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. That question is whether the following test set forth in *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), applies to constitutional interests generally, or is limited to First Amendment cases:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of

> prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

The decision at bar conflicts with a literal reading of the above, and the circuits have ruled both ways on the issue. *See* App. 5a, 8a, 11a-13a (majority); 17a-18a (Sentelle, J., dissenting). Senior Judge Williams, author of the majority opinion, called for rehearing *en banc*, on the basis that the *Navegar* precedent (on which the court relied) "appeared to be in conflict with an earlier Supreme Court decision, *Babbitt v. United Farm Workers Nat'l Union* [citation omitted]." App. 27a. However, if the above statement is narrowly limited to First Amendment interests rather than "constitutional interest[s]" in general, this Court should so clarify that rule.

Resolution of this issue in the context of the present type of case is an important federal question. Senior Judge Williams explained it best when he concluded in calling for rehearing *en banc*:

> I do not think our law of standing requires that citizens who want to obey the law, but also to follow their judgment as to self-preservation, be told that they cannot get a reading on the validity of the law except by pursuing concededly useless administrative avenues or by engaging in forbidden behavior that is sure to be exposed if the risk they fear arises. (App. 30a)

Petitioners are law-abiding residents of the District of Columbia who wish to possess pistols and usable firearms in their dwellings for security and protection against crime. These measures are prohibited by D.C. Code § 7-2502.02(a) (prohibits

registration of pistol), § 7-2507.02 (requires firearms to be unloaded and disassembled or locked), and § 22-4504(a) (prohibits carrying pistol in one's dwelling). "[N]o specific intent to use the gun" need be proven for a conviction.[6]

Petitioners sought a declaratory judgment that these prohibitions (1) are inconsistent with D.C. Code § 1-303.43, the enabling act in which Congress authorized the District to pass only "usual and reasonable police regulations . . . necessary for the regulation of firearms,"[7] and (2) infringe on "the right of the people to keep and bear arms" guaranteed by the Second Amendment to the U.S. Constitution. The plain language of the enabling act, together with the canon of constitutional avoidance, *see Clark v. Suarez Martinez*, 125 S. Ct. 716, 724 (2005), may be applied to invalidate the ordinances at issue and to avoid the constitutional issue.

Petitioners suffer injury in fact by being forced into the dilemma of forgoing prudent security measures to protect themselves from criminals, or violating the law and being subjected to arrest and prosecution. The injury is traceable to the challenged laws and enforcement thereof. Their injuries would be redressed by a favorable decision. They thus meet the criteria for standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

Two standing issues arise in this case which this Court

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[6] *Bsharah v. United States*, 646 A.2d 993, 999-1000 (D.C. 1994).

[7] Viewing the "usual" prong alone, the District's pistol ban is most unusual, as not one of the 50 States in the United States bans pistols. This Court has held that a "national consensus" of what is "cruel and *unusual*" may be established by 30 States. *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005).

should clarify. First, does standing exist on the part of persons who will not violate the law unless and until a court invalidates the law, at which time such persons incontestably *will forthwith* engage in activities the invalidated law proscribes? This issue arises with the Petitioners who would possess pistols in the District forthwith on a judicial decision invalidating the pistol prohibition. Second, does standing exist on the part of persons who *will violate the law in a dire emergency* which may or may not come to pass, but for which a prudent person must take steps to meet? This issue arises with Petitioner Hailes, a past burglary victim who refuses to be a victim again.[8]

The opinion below itself provides an excellent discussion of the conflict within the case law on standing which this Court should resolve. It begins by quoting the following from *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (App. 5a):

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.[9]

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[8] Depicting serious threatened injury from criminal violence as "speculative" disregards common prudence. A hurricane like Katrina may or may not hit New Orleans and the surrounding Gulf region again during our lifetime, but prudent people will certainly take steps to prepare for just such a disaster.

[9] "It is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). *See id.* at 480 ("the declaratory judgment procedure

That case involved a union's preenforcement challenge to a state criminal law relating to unfair labor practices. While the state pointed out that the criminal penalty had not been (and might never be) applied, this Court noted that "the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices," and that the fear of prosecution was not "imaginary or wholly speculative." 442 U.S. at 302. Based on that, the decision below concludes: "Thus *United Farm Workers* appeared to find a threat of prosecution credible on the basis that plaintiffs' intended behavior is covered by the statute and the law is generally enforced."[10] App. 8a. As the decision readily concedes, Petitioners easily meet that test:

> Whatever the ultimate understanding of the Second Amendment, compare *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), with *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the conduct that plaintiffs would engage in is at least arguably affected with a constitutional interest, but proscribed by a statute. (App. 13a)

The above test has been applied in cases both involving and not involving the First Amendment. Slip op. 8a (citations omitted). Indeed, the decision below states:

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is an alternative to pursuit of the arguably illegal activity") (Rehnquist, J., concurring).

[10] "As appellants allege a similarly realistic fear of prosecution, I would hold *United Farm Workers* controlling, and conclude that appellants have standing to bring the Second Amendment challenge." App. at 18a (Sentelle, J., dissenting).

> [T]he idea of a special First Amendment rule for preenforcement review of statutes seems to have no explicit grounding in Supreme Court decisions. In *United Farm Workers*, for example, although plaintiffs in fact attacked the statute on First Amendment grounds, the Court conspicuously neglected to mention the point in its discussion of standing. *United Farm Workers*, 442 U.S. at 297-302. (App. 12a.)

Despite the above, the court below felt bound by what it viewed as a contrary holding in "our circuit's single post-*United Farm Workers* case" involving a preenforcement review of a criminal law not involving the First Amendment or the appeal of an agency decision. App. 9a-10a, citing *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997).

Navegar found preenforcement standing to challenge the federal "assault weapon" prohibition regarding products of particular companies actually named in the law, finding that the threat of prosecution could be deemed speculative "only if it is likely that the government may simply decline to enforce these provisions at all." App. 10a, quoting 103 F.3d at 1000. However, standing did not exist to challenge portions of the statute prohibiting firearms by general characteristics rather than by name. *Id.*, citing 103 F.3d at 1001.

To be sure, *Navegar* contains the same internal conflicts that the panel in the case at bar describes. *Navegar* stated:

> A credible threat of imminent prosecution can injure the threatened party by putting her between a rock and a hard place--absent the availability of preenforcement review, she must either forego possibly lawful activity because of

> her well-founded fear of prosecution, or willfully violate the statute, thereby subjecting herself to criminal prosecution and punishment.

Id. at 998-99.

Indeed, *Navegar* observed that to require litigants "to violate the law and subject themselves to criminal prosecution before their challenges may be heard would create incentives that are perverse from the perspective of law enforcement [and] unfair to the litigants . . . ." 103 F.3d at 1000-01. Yet that is exactly where the Petitioners here are left.

The court below read *Navegar* to require very specific threats to prosecute, at the same time acknowledging contrary precedents. "There is . . . tension between *Navegar* and our cases upholding preenforcement review of First Amendment challenges to criminal statutes." App. 11a (citations omitted).

Moreover, "*Navegar*'s analysis is in sharp tension with standard rules governing preenforcement challenges to agency regulations," where the litigants have standing because they face the dilemma of costly compliance measures or the risk of enforcement. App. 10a, citing *Abbott Labs. v. Gardner,* 387 U.S. 136, 149 (1967). "The passage from *United Farm Workers* quoted at the outset alludes to precisely this hardship." App. 11a.

One might attempt to explain the recognition of hardship caused by a regulation while rejecting equivalent hardship caused by a statute by the need to avoid resolving constitutional issues posed by the latter. "That answer seems weak, as courts reviewing agency action commonly give preenforcement review not only to statutory claims but to constitutional attacks on the underlying statute." App. 11a (citations omitted).

This seemingly irrational distinction is particularly egregious here. Law-abiding citizens who wish to protect themselves from criminal violence in their own homes by obtaining firearms apparently must, in order to have standing to protect their constitutional and statutory rights, break the law and inform law enforcement so that they will become sufficiently threatened with prosecution.[11] This Court's jurisprudence does not require corporations to violate the law to prevent economic injury occasioned by agency regulations. *Abbott Labs., supra.* Nor does it require citizens who wish to avoid potential death or serious bodily injury to violate the law in order to have their rights declared.

All kinds of injuries, from economic to aesthetic, have been recognized for purposes of standing. *See Lujan*, 504 U.S. at 562, 573 (reaffirming cases finding standing on aesthetic grounds). If avoidance of psychological harm by not being able to enjoy seeing an animal confers standing, so too does the avoidance of psychological and physical harm knowing that one has a defense to criminal attack. Indeed, "The right to defend oneself from a deadly attack is fundamental." *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982).[12] The District has

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[11] While even a wilful lawbreaker may not be caught, *Blanchette v. Conn. General Insurance Corp.*, 419 U.S. 102, 143 n.29 (1974), "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Id.* at 143.

[12] "The right of defense of self, property and family is a fundamental part of our concept of ordered liberty. . . . For many, the mere possession of a firearm in the home offers a source of security." *Arnold v. Cleveland*, 616 N.E.2d 163, 169-70 (Ohio 1993). "If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence . . . ." *State v. Hamdan*, 2003 Wis. 113, 665 N.W.2d 785, 808 (2003).

no legal duty to protect plaintiffs.[13]

"An identifiable trifle is enough for standing . . . ." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (*e.g.*, a stake of $5). A preenforcement challenge to a criminal statute may be every bit as much a case or controversy as a challenge to a civil statute or regulation, and may be far more compelling due to the risk of loss of liberty, property, livelihood, and reputation.

The decision below does recognize that arguable violation of a constitutional right may confer an element of standing, but is not sufficient. It states:

> [T]he conduct that plaintiffs would engage in is at least arguably affected with a constitutional interest, but proscribed by a statute. Thus, the first requirement of *United Farm Workers* and *Navegar* is satisfied. (App. 13a)

Indeed, standing may derive from "the 'zone of interests' intended to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982).[14] *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999) (plaintiff "suffered a cognizable injury as a result of the statute's

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[13] "A government and its agents are under no general duty to provide . . . police protection, to any particular individual citizen." *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981) (*en banc*).

[14] "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n.3 (1973).

enactment [depriving him of firearm], and that injury is one that would be redressed through a favorable ruling on his Second Amendment challenge"), *cert. denied*, 528 U.S. 1116 (2000).

The court below notes that the District "enforces its gun laws, prosecuting 'all violators of the statute under normal prosecutorial standards.'" App. Slip op. 13a, quoting *Austin v. United States*, 847 A.2d 391, 393-94 (D.C. 2004).[15] However, "plaintiffs allege no prior threats against them or any characteristics indicating an especially high probability of enforcement against them." App. 13a. Yet requiring prior threats to be the tail which wags the standing dog would mean that law-abiding citizens could never bring a preenforcement action, which would thereby be confined only to actual lawbreakers or persons who recklessly live on the murky edge, because only such persons receive highly concrete threats of prosecution. It ignores that good citizens do not risk getting criminal records and do not violate the law even if they will not be caught. It is enough that such citizens, as here, would engage in proscribed conduct "forthwith" but for a law which is duly enforced, and will in fact engage in that conduct on a judicial determination that the law is invalid.

Not only do Petitioners allege that they will forthwith obtain pistols on a proper judicial determination, but also plaintiff Jordan owns and stores a pistol outside the District, and would keep it at his home in the District if he could lawfully do so. "Plaintiffs correctly argue that *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522, 528-29 (6th Cir. 1998) ("*PRO*"), supports preenforcement standing in precisely this circumstance." App. 14a. *PRO* found standing where

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[15] This is not a case where the law is not enforced, as in *Poe v. Ullman*, 367 U.S. 497, 501 (1961) (ban on contraceptives), and *Doe v. Duling*, 782 F.2d 1202, 1204 (4th Cir. 1986) (fornication law).

plaintiffs faced the Hobson's choice of the following: "They can either possess their firearms in Columbus and risk prosecution under the City's law, or, alternatively, they can store their weapons outside the City, depriving themselves of the use and possession of the weapons."[16] *PRO*, 152 F.3d at 529.

Since it found that the plaintiffs were threatened with prosecution, the *PRO* court implied that they may have been in violation of the law, and thus had standing. By contrast, it is undisputed here that none of the Petitioners are in violation of the law. But the important point is that the threat of prosecution was no more imminent in *PRO* than here.

Moreover, Petitioner Hailes has already been the victim of a crime in her home and may well be the victim of a future attack. Judge Ginsburg's observation that Petitioner Hailes allegations of future injury are "highly speculative" (App. 27a) cannot be squared with the record.

Any attempt to reconcile the D.C. Circuit's decision here with the Sixth Circuit's decision in *PRO* is unavailing: "*PRO* is plainly inconsistent with *Navegar*." App. 14a. The court below found the threat in *Navegar* as even greater than that in *PRO*, in which the plaintiffs argued that the law was vague. Yet the allegedly vague portions of the federal assault weapon law challenged in *Navegar* were subject to clarification by the agency that enforced it. By contrast, the law in *PRO* was fit for review because it "is not subject to any type of clarifying interpretation . . . . Rather, the words of the ordinance provide

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[16] "[Plaintiffs] risk prosecution and possible imprisonment if they possess their weapons within Columbus, as the City has assured us that it will prosecute those who violate its assault weapons ban." *PRO*, 152 F.3d at 530.

the sole source of guidance for firearms' owners."[17] *PRO*, 152 F.3d at 530.

The plaintiffs in *PRO* did the only thing that responsible firearm owners could have done – seek a judicial resolution. "[A] citizen should be allowed to prefer 'official adjudication to public disobedience.'" *Id.* The alternative would have entailed the perverse result of flaunting one's disobedience of the law sufficiently to provoke law enforcement authorities into threatening or issuing an actual arrest warrant.

This Court in *Steffel* recalled the words of Professor Borchard, author of the Declaratory Judgment Act, about courts forcing a plaintiff into the alternatives of violating a statute to test its constitutionality or of foregoing the exercise of his claimed rights:

> Into this dilemma no civilized legal system operating under a constitution should force any person. The court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it. Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its

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[17] A challenge to a firearms prohibition is justiciable where "the plaintiffs wish to engage in conduct plainly prohibited on the face of the allegedly unconstitutional statute." *Coalition of New Jersey Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 673 n.10 (D. N.J. 1999), *aff'd*, 263 F.3d 157 (3d Cir. 2001) (*mem.*), *cert. denied*, 534 U.S. 1039 (2001).

constitutionality.

Steffel, 415 U.S. at 468 n.18, quoting Hearings on H.R. 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., 75-76 (1928).

Petitioner Hailes possesses a shotgun in her home secured by a trigger lock. But for the District's prohibition, she would remove it when necessary to defend herself in her home. The district court found that she had standing because she must forego possibly lawful activity based on her "well-founded fear of prosecution," and because she lacked an administrative remedy. App. 15a. The court below disagreed: "But the lack of an administrative remedy, while it increases the hardship resulting from denial of preenforcement review, still does not enable Hailes to meet the *Navegar* test." App. 16a.

Judge Sentelle would have found standing. App. 16a (Sentelle, J., dissenting). "As the majority notes, a long line of cases upholds pre-enforcement review of First Amendment challenges to criminal statutes by plaintiffs with bases for standing no different than that asserted by appellants herein for their Second Amendment challenge." App. 18a, citing *Virginia v. American Booksellers Ass'n,* 484 U.S. 383 (1988).

In *American Booksellers*, plaintiffs challenged a prohibition on the display for sale of certain sexually-related material. Injury was threatened "as the law is aimed directly at plaintiffs, who . . . will have to take significant and costly compliance measures or risk criminal prosecution." 484 U.S. at 392. This Court found preenforcement review proper:

> The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that

> plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

Id. at 393.

As Judge Sentelle comments about the above: "The only difference between that harm and the harm alleged in this case is that there it was to First Amendment interests, here to Second. I know of no hierarchy of Bill of Rights protections that dictates different standing analysis."[18] App. 19a. Judge Sentelle concludes: "The allegedly constitutionally protected conduct in the record before us is clearly defined and clearly unlawful under a statute that the District apparently enforces regularly, and under which there is certainly no doubt that plaintiffs reasonably apprehend enforcement." App. 20a (Sentelle, J., dissenting).

Chief Judge Ginsburg filed a statement concurring in the denial of the petition for rehearing *en banc*. He stated that Petitioners "could have applied to register a pistol and then challenged the subsequent denial of that application on the basis of the Second Amendment in the courts of the District of Columbia . . . ." App. 26a, citing D.C. Code §§ 2-510(a), 7-2502.10(b), 7-2507.09. While plaintiff Hailes has no administrative remedy, it was only "speculative" that she would remove the trigger lock and be prosecuted. App. 27a.

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[18] No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing . . . ." *Valley Forge*, 454 U.S. at 484.

However, Senior Circuit Judge Williams wrote about the plaintiffs:

> The imminence of the threat to their security matched the imminence of the threat of prosecution; the greater the probability of enforcement, the greater the pressure to forego what they saw as lawful and needed security precautions. And the defendant governments in no way suggested any reluctance to enforce the laws to the hilt. Although the threat of prosecution appeared as imminent as in *United Farm Workers, Navegar* demanded a higher level of imminence, indeed one rarely attainable in practice. (App. 28a)

Regarding the argument that the plaintiffs could apply to register pistols, Judge Williams noted:

> The statutes plainly, unequivocally, bar issuance of such permits. See D.C. Code §§ 7-2502.01, 7-2502-02(a) . . . . That being so, it is mysterious to me how plodding through the charade of seeking permits would render the threat of prosecution (and thus the need to forego measures for their security) one iota more imminent. . . . The availability of a null administrative remedy seems irrelevant to the standing issue. (App. 28a)[19]

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[19] Quoting *United Farm Workers*, 442 U.S. at 298, Judge Williams added:

> it is an illusion to suppose that pursuit of the administrative "remedies" identified by the defendant

The Second Circuit recently resolved that issue in favor of standing in *Bach v. Pataki*, 408 F.3d 75 (2nd Cir. 2005). The plaintiff sought a declaratory judgment that New York's statute denying firearms licenses to non-residents violated the Second Amendment and the Privileges and Immunities Clause. The court held that the plaintiff had standing despite not having applied for a license:

> Imposing a filing requirement would force Bach to complete an application for which he is statutorily ineligible and to file it with an officer without authority to review it. "We will not require such a futile gesture as a prerequisite for adjudication in federal court."

408 F.3d at 83 (citation omitted).

The same rule applies here, and is consistent with this Court's jurisprudence. *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958) (rejecting view that "appellant lacked standing to attack the constitutionality of the ordinance because she made no attempt to secure a permit under it"). "[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996).

Moreover, this action seeks relief under 42 U.S.C. § 1983. "[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516 (1982). If the availability of State administrative

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governments could alleviate the burden on plaintiffs of "await[ing] and undergo[ing] a criminal prosecution as the sole means of seeking relief." (App. 29a)

procedures (however futile) and of an appeal in State courts preclude plaintiffs from having standing in federal court, few § 1983 actions would be brought in federal courts.[20]

For petitioner Hailes, there is not even a futile administrative remedy available. She wishes to remove the trigger lock from her shotgun and load it if she feels threatened by a possible intruder. As Judge Williams explains, it will then be too late to have her rights declared:

> But if such an intrusion occurs, and she is able to defend herself by virtue of having violated the law, the ensuing police investigation will bring out the evidence of her crime (unless she were to successfully commit another crime by lying about how she kept the gun). . . . The risk of prosecution in the event of the contingency she fears is high, and thus the resulting deterrent to her freeing the trigger lock is effectively as great as if she proposed to violate the law down at the police station. (App. 29a)

It is no defense to the District's firearms prohibitions that a person is a crime victim merely seeking to protect herself from attack.[21] Even if it was, the outcome would be known only after she was arrested, prosecuted, tried, convicted or

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[20] After all, State courts have concurrent jurisdiction over § 1983 claims. *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980).

[21] *Yoon v. United States*, 594 A.2d 1056, 1057 (D.C. 1991) (upholding conviction of market owner who was repeatedly robbed and shot at).

acquitted, and an appeal taken – all harms she wishes to avoid.[22] *See Stein v. United States*, 532 A.2d 641, 644 (D.C. 1987), *cert. denied*, 485 U.S. 1010 (1988) ("his right to avoid prosecution (if he has such a right) cannot be 'vindicated by an acquittal at trial or on appeal'").

America's law-abiding gun owners should have the same access to the courthouse door to have their rights declared as do wildlife watchers[23] and commercial interests (such as the businesses in *Abbott Labs.*). "Roughly 50 percent of American homes contain at least one firearm of some sort," *Staples v. United States*, 511 U.S. 600, 613-14 (1994), and "there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 610. Lawful gun owners have a responsibility to seek judicial determinations of their rights at a point no where near crossing the line of potential law breaking, rather than recklessly engaging in violations of the law to attain the elusive "standing" status advocated by the Respondents here.

Moreover, clarification by this Court of the law of standing in the context of the threat of criminal prosecution would be beneficial in many other circumstances. As the opinion below explains, the circuits differ – in some cases dramatically – over the required level of threat as applied to a

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[22] *E.g.*, *Cooper v. United States*, 512 A.2d 1002 (D.C. 1986) (affirming conviction).

[23] *E.g.*, *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230-31 n.4 (1986) (environmental organizations had standing because "whale watching and studying of their members w[ould] be adversely affected by continued whale harvesting").

variety of topics. App. 6a.[24]

The decision below leaves the residents of the District of Columbia in the untenable predicament of risking imprisonment if they take prudent steps to protect themselves from criminal violence. This Court should grant this petition to vindicate the rights of the Petitioners and the thousands of other D.C. residents who seek nothing more than the ability to exercise their constitutionally guaranteed individual right to keep and bear arms.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

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[24] *Compare San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996) (requiring a specific time and date at which plaintiffs intended to violate the law) *with Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 75 (4th Cir. 1991) (persons should comply with the law and seek declaratory relief).

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 17, 2004 Decided February 8, 2005

No. 04-5015

Sandra SEEGARS, et al.,
Appellants/Cross-Appellees

v.

John D. Ashcroft,
Attorney General of the United States and
Anthony A. Williams, Mayor, District of Columbia,
Appellees/Cross-Appellants

Consolidated with
04-5081

Appeals from the United States District Court
for the District of Columbia
(No. 03cv00834)

Stephen P. Halbrook argued the cause for appellants/cross-appellees. With him on the briefs was *Richard E. Gardiner*.

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Daniel Meron, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for

appellees/cross-appellants. With him on the brief were *Peter D. Keisler*, Assistant Attorney General, *Kenneth L. Wainstein*, U.S. Attorney, and *Mark B. Stern* and *Lewis Yelin*, Attorneys.

Lutz Alexander Prager, Attorney, Office of Attorney General for the District of Columbia, argued the cause for appellee The District of Columbia. With him on the brief were *Robert J. Spagnoletti*, Attorney General, and *Edward E. Schwab*, Deputy Attorney General.

Andrew L. Frey, David M. Gossett, Mathew S. Nosanchuk, and *Eric J. Mogilnicki* were on the brief for *amici curiae* The Brady Center to Prevent Gun Violence, et al. in support of appellee.

Before: SENTELLE and TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* STEPHEN F. WILLIAMS.

Dissenting opinion filed by *Circuit Judge* SENTELLE.

WILLIAMS, *Senior Circuit Judge*: Plaintiffs raise Second Amendment and local law claims against provisions of the District of Columbia's criminal code that bar them from registering and lawfully possessing pistols within the District of Columbia, or maintaining firearms in their homes free of mandates that they be unloaded and disassembled, or secured by a trigger lock. The district court held that the plaintiffs lacked standing to challenge the provisions limiting the lawful possession of pistols, but that one plaintiff (Hailes) could

challenge the "trigger lock" provision. *Seegars v. Ashcroft*, 297 F.Supp.2d 201, 203-04 (D.D.C.2004). Because we find that under controlling circuit precedent no plaintiff has standing to challenge either provision, we affirm in part and reverse in part.

* * *

D.C.Code § 7-2502.01 prohibits a person from possessing a firearm in the District of Columbia unless it is validly registered. Pursuant to D.C.Code § 7-2502.02(a)(4), pistols not already registered before September 24, 1976 may not now be registered. And D.C.Code § 22-4504(a) prohibits carrying a pistol either openly or concealed on or about one's person without a license within the District of Columbia. As a result, it is not possible in the District to purchase and lawfully possess a new pistol--or indeed any pistol not registered here three decades ago. A fourth provision requires that registrants keep firearms unloaded and disassembled, or bound by a trigger lock or similar device, subject to exceptions for firearms kept at places of business or firearms that are being lawfully used for recreational purposes in the District. See D.C.Code § 7-2507.02. All plaintiffs in this case would like to lawfully possess pistols in the District. Joint Appendix ("J.A.") 14- 15. Plaintiff Jordan is the only plaintiff who owns a pistol, but he stores it outside the District in order to avoid violating the law. J.A. 15. Plaintiff Hailes possesses a shotgun that she stores at her home, and would like to remove the trigger lock when she feels endangered. J.A. 14-15. Most of the plaintiffs allege that they live in high-crime neighborhoods and would like to possess loaded weapons in their homes for protection, not secured by a trigger lock; because of the threat of criminal prosecution, they forego what they believe would be the additional security of

possessing pistols or possessing a shotgun ready for immediate use. *Id.* Under 28 U.S.C. § 2201 plaintiffs seek a declaration that the challenged provisions are unlawful.

No plaintiff in this case has been arrested and prosecuted for violating the disputed provisions of the Code, so plaintiffs' case constitutes a "preenforcement" challenge. To meet the "case and controversy" requirement of Article III they must allege an "injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); see *also Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C.Cir.1996).

Assessing standing to attack a statute on constitutional grounds, the Supreme Court has said:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (citing *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973)) (internal quotation marks omitted). Compare *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 n. 29, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) (suggesting that ripeness for

pre-enforcement review of criminal statutes was to be resolved "on a case-by-case basis, by considering the likelihood that the complainant will disobey the law, the certainty that such disobedience will take a particular form, any present injury occasioned by the threat of prosecution, and the likelihood that a prosecution will actually ensue").

In addressing the plaintiff's side of the story, some circuits have demanded that he express an *unconditional* intention to engage in the proscribed behavior, regardless of whether the statute is invalidated, see, e.g., *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1127 (9th Cir.1996) (discussing lack of allegation of a specific time and date at which plaintiffs intended to violate the Crime Control Act). But any such requirement seems inconsistent with our circuit's law, see, e.g., *American Library Ass'n v. Barr*, 956 F.2d 1178, 1196 (D.C.Cir.1992); but cf. *Martin Tractor Co. v. FEC*, 627 F.2d 375, 382-83 (D.C.Cir.1980) (holding portion of preenforcement challenge not ripe where appellants "allege that their behavior has thus far conformed to the statutory mandate. They make no allegation of an intention imminent or otherwise to violate the statute ...."), and has been expressly rejected by other circuits, e.g., *Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 75 (4th Cir.1991) ("Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.").

On the government's side, the requirement of a credible

threat of prosecution ensures that the threatened injury be imminent. Imminence can also be evaluated in terms of ripeness, but the severity of the required threat is independent of the doctrinal hook. See *Doe v. Duling*, 782 F.2d 1202, 1206 n. 2 (4th Cir.1986). Unfortunately the adjective "credible" says little or nothing about the requisite level of probability of enforcement, and clarity prevails only at the poles. If the threat is imagined or wholly speculative, the dispute does not present a justiciable case or controversy. *Younger v. Harris*, 401 U.S. 37, 42, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). Evidence that the challenged law is rarely if ever enforced, for example, may be enough to defeat an assertion that a credible threat exists. See, e.g., *D.L.S. v. Utah*, 374 F.3d 971, 974-75 (10th Cir.2004) (no standing to challenge the constitutionality of Utah's sodomy statute where plaintiff had never been charged, prosecuted, or directly threatened with prosecution, and where prosecutors were apparently not actively enforcing the law); *Clarke v. United States*, 915 F.2d 699, 701-02 (D.C.Cir.1990) (discussing mootness) (no live case or controversy where there had been no prosecution under the Anti-Deficiency Act and the government had expressed its view that no successful prosecution could be maintained). By contrast, actual threats of arrest made against a specific plaintiff are generally enough to support standing as long as circumstances haven't dramatically changed. See *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).

In *United Farm Workers*, a union challenged provisions of a state statute that made it an unfair labor practice, punishable with criminal penalties, to encourage consumer

boycotts of agricultural products by the use of "dishonest, untruthful and deceptive publicity." 442 U.S. at 301, 99 S.Ct. 2301. The state argued that the criminal penalty provision had not yet been applied and might never be applied to unfair labor practices. *Id.* at 302. The Court found standing, saying that "the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices," *id.*, and that the union's fear of prosecution was not "imaginary or wholly speculative," *id.* Thus *United Farm Workers* appeared to find a threat of prosecution credible on the basis that plaintiffs' intended behavior is covered by the statute and the law is generally enforced. Courts have often found that combination enough, especially where plaintiffs seek to engage in activities possibly protected by the First Amendment, see, e.g., *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir.2003) (*citing New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 13 (1st Cir.1996)), but not exclusively in such cases, see *Hejira Corp. v. MacFarlane*, 660 F.2d 1356, 1360 (10th Cir.1981) (plaintiffs had standing to challenge drug paraphernalia statute even where no criminal prosecutions had been commenced and no specific arrest threatened). But courts have also found the absence of a specific threat fatal. See, e.g., *San Diego County Gun Rights Committee*, 98 F.3d at 1127.

Related to but distinct from the requisite likelihood of enforcement is a possible requirement that the plaintiffs occupy a position different from that of others who (conditionally) intend to commit acts that would violate the statute. The district court used language arguably reflecting such a view: "A generalized grievance, which is presumably shared with many other citizens of the District of Columbia, without an imminent threat of prosecution or another type of injury-in-fact (i.e.,

economic harm), is not sufficient to confer standing to the plaintiffs." *Seegars*, 297 F.Supp.2d at 214.

To the extent that this language implied that plaintiffs must be individually or specifically burdened in a way distinct from some broader class of potential prosecutees, it is at variance with Supreme Court precedent. Although injuries that are shared *and* generalized--such as the right to have the government act in accordance with the law--are not sufficient to support standing, see *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), "where a harm is concrete, though widely shared, the Court has found injury in fact." *FEC v. Akins*, 524 U.S. 11, 24, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (internal quotation marks omitted); see also *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-50, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (plaintiffs had standing to challenge non- disclosure of information even where innumerable other parties might make identical requests for disclosure). Although the political arena may prove appropriate to correct illegal injuries inflicted on much of the public, the fact that an injury is shared, so long as it is concrete enough, doesn't preclude standing. *FEC v. Akins*, 524 U.S. at 24-25, 118 S.Ct. 1777 (giving examples of mass tort injuries or injury involving widespread interference with voting rights).

For preenforcement challenges to a criminal statute not burdening expressive rights and not in the form of appeal from an agency decision, our circuit's single post-*United Farm Workers* case appears to demand more than a credible statement by the plaintiff of intent to commit violative acts and a conventional background expectation that the government will enforce the law. In *Navegar, Inc. v. United States*, 103 F.3d 994

(D.C. Cir.1997), we dealt with a preenforcement challenge by two manufacturers to provisions of the Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 1796, that made it unlawful to manufacture or possess a semiautomatic assault weapon. 103 F.3d at 997. Portions of the statute prohibited weapons by name that were manufactured only by specific companies. See *id.* With respect to these provisions, we found preenforcement standing because the provisions essentially singled out the companies by name, *id.* at 1000, saying that for those weapons the threat of prosecution could be deemed speculative "only if it is likely that the government may simply decline to enforce these provisions at all." *Id.* But we found no standing for the companies to challenge portions of the statute that described prohibited weapons only by general characteristics rather than by name. *Id.* at 1001.

We cannot help noting that *Navegar* 's analysis is in sharp tension with standard rules governing preenforcement challenges to agency regulations, where an affected party may generally secure review before enforcement so long as the issues are fit for judicial review without further factual development and denial of immediate review would inflict a hardship on the challenger-- typically in the form of its being forced either to expend non-recoverable resources in complying with a potentially invalid regulation or to risk subjection to costly enforcement processes. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 170, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967); *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C.Cir.1998). See also *Chamber of Commerce v. FEC*, 69 F.3d 600, 604

(D.C.Cir.1995) ("an agency rule, unlike a statute, is typically reviewable without waiting for enforcement"). The passage from *United Farm Workers* quoted at the outset alludes to precisely this hardship.

One might explain our greater readiness to hear challenges to regulations than to statutes on the ground that challenges to a statute bring into play all the conventional reasons to avoid premature constitutional adjudications. That answer seems weak, as courts reviewing agency action commonly give preenforcement review not only to statutory claims but to constitutional attacks on the underlying statute. See *Time Warner Entertainment Co.* v. FCC, 93 F.3d 957, 965, 973 (D.C. Cir.1996). Cf. *General Electric Co. v. EPA*, 360 F.3d 188 (D.C. Cir.2004) (interpreting explicit limit on review as *not* precluding preenforcement review of facial due process challenge to statute).

There is also tension between *Navegar* and our cases upholding preenforcement review of First Amendment challenges to criminal statutes. See, e.g., *Chamber of Commerce v. FEC*, 69 F.3d at 603-04; see also *American Library Ass'n*, 956 F.2d at 1194, 1196 (finding no plaintiff with standing, but demanding only that plaintiffs show an intent to commit acts that would really or arguably violate the provisions challenged). Such cases here and in other courts appear to have rested on the special concern for "chilling effects" on speech. See, e.g., *Chamber of Commerce v. FEC*, 69 F.3d at 604; *New Hampshire Right to Life PAC*, 99 F.3d at 12. Yet, while there is a special First Amendment standing doctrine allowing a party in some circumstances to challenge a provision on the ground that it violates the rights of someone other than the plaintiff

himself, see, e.g., *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988), the idea of a special First Amendment rule for preenforcement review of statutes seems to have no explicit grounding in Supreme Court decisions. In *United Farm Workers*, for example, although plaintiffs in fact attacked the statute on First Amendment grounds, the Court conspicuously neglected to mention the point in its discussion of standing. *United Farm Workers*, 442 U.S. at 297-302, 99 S.Ct. 2301.

Despite these apparent tensions, we faithfully apply the analysis articulated by *Navegar*. We do so *not* because it represents our "law of firearms." See generally Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207, 207-08 (1996). We do so because it represents the only circuit case dealing with a non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency proceedings. See *LaShawn v. Barry*, 87 F.3d 1389, 1395 (D.C.Cir.1996) (en banc).

* * *

Pistols. All plaintiffs allege that but for D.C.Code §§ 7-2502.02(a), 22-4504(a), they would obtain and register pistols to keep and carry in their homes in the District. J.A. 14-15, 17. Plaintiff Jordan already owns a pistol that he stores outside the District, which he would register and keep in the District but for the Code. J.A. 15. The district court held that the pistol plaintiffs lacked standing because they face no credible threat of imminent prosecution under the District's gun laws. *Seegars*, 297 F.Supp.2d at 213-14.

Whatever the ultimate understanding of the Second Amendment, compare *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir.2002), with *United States v. Emerson*, 270 F.3d 203 (5th Cir.2001), the conduct that plaintiffs would engage in is at least arguably affected with a constitutional interest, but proscribed by a statute. Thus, the first requirement of *United Farm Workers* and *Navegar* is satisfied.

We agree with the district court, however, that the pistol plaintiffs have not shown a threat of prosecution reaching the level of imminence required by *Navegar*. See 103 F.3d at 1001. Plaintiffs note that the District's gun laws are enforced, see Reply Brief for Appellants/Cross-Appellees at 4, and indeed cite the District's position in prior litigation, declaring that it enforces its gun laws, prosecuting "all violators of the statute under normal prosecutorial standards." *Austin v. United States*, 847 A.2d 391, 393-94 (D.C.2004) (discussing regulation of concealed weapons). But plaintiffs allege no prior threats against them or any characteristics indicating an especially high probability of enforcement against them. As was true for the claims found non-justiciable in *Navegar*, "nothing ... indicates any special priority placed upon preventing *these parties* from engaging in specified conduct." 103 F.3d at 1001 (emphasis added); see also *Lion Mfg. Corp. v. Kennedy*, 330 F.2d 833, 839 (D.C.Cir.1964).

Plaintiff Jordan presents a slightly different case, as he currently owns a pistol, which he stores outside the District. But this improves only the assurance of his conditional intent to commit acts that would violate the law, an assurance that is adequate even for the other plaintiffs. As is true of the other pistol plaintiffs, there is nothing in the record to indicate that he

has been personally threatened with prosecution or that his prosecution has "any special priority" for the government. See *Navegar*, 103 F.3d at 1001.

Plaintiffs correctly argue that *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522, 528-29 (6th Cir.1998) ("*PRO*"), supports preenforcement standing in precisely this circumstance. There the Sixth Circuit entertained a preenforcement challenge to Columbus's assault weapons ban. It held the plaintiffs--owners of weapons who were allegedly uncertain as to whether the ordinance prohibited their weapons--faced a clear Hobson's choice: "They can either possess their firearms in Columbus and risk prosecution under the City's law, or, alternatively, they can store their weapons outside the City, depriving themselves of the use and possession of the weapons." *PRO*, 152 F.3d at 529. The court found the costs of selecting either option high enough to support a preenforcement challenge. *Id.* at 529-30. But see *National Rifle Association v. Magaw*, 132 F.3d 272, 293-94 (6th Cir.1997).

But *PRO* is plainly inconsistent with *Navegar*. Indeed, the imminence of enforcement appears to have been greater in *Navegar*, as in that case agents of the Bureau of Alcohol, Tobacco and Firearms had visited the plaintiff gun manufacturers, alerted them to the prohibitions in question, and conducted inventories of their firearms stocks, including those of the weapons about to be barred. 103 F.3d at 997, 1001.

Thus the district court here was correct not to follow *PRO*, which applied a far less stringent standard than *Navegar*. But it distinguished *PRO* on the ground that the need for judicial intervention was stronger there because the case

included a vagueness challenge. *Seegars*, 297 F.Supp.2d at 213. We think that an incorrect basis of distinction. We see no reason why plaintiffs whose proposed conduct is merely *possibly* barred by statute should be preferred over ones--like those here--whose proposed conduct is indisputably barred.

Under *Navegar*, therefore, we affirm the decision of the district court that no plaintiff challenging the District's pistol provisions in this case has presented a justiciable case or controversy.

Trigger Lock. Plaintiff Hailes possesses a shotgun that she keeps in her home secured by a trigger lock. J.A. 15. She alleges that but for the D.C.Code she would "remove the trigger lock when she deems it necessary to defend herself in her home." *Id.* The district court concluded that Hailes had standing because she must maintain the trigger lock on her shotgun and forego possibly lawful activity because of her "well-founded fear of prosecution." *Seegars*, 297 F.Supp.2d at 217. To distinguish Hailes from the rest of the plaintiffs, the district court relied on the fact that Hailes had no administrative remedy. See *id.* at 216. Unlike the plaintiffs challenging the pistol regulation, who could apply to register the pistol and then subsequently challenge the inevitable denial, Hailes was left to either leave the trigger lock on her shotgun or remove it and risk criminal prosecution. *Id.*

But the lack of an administrative remedy, while it increases the hardship resulting from denial of preenforcement review, still does not enable Hailes to meet the *Navegar* test. In that case the manufacturers denied standing had no administrative remedy, at least so far as appears, and yet we

held their challenge (to the provisions that didn't identify their unique brands) non-justiciable simply because we found the threat of prosecution inadequate, even though the visiting BATF agents had taken an inventory of their soon-to-be-prohibited weapons. *Navegar*, 103 F.3d at 1001. While an unused administrative remedy's presence will often defeat adjudication under doctrines of ripeness, finality or exhaustion, its absence is not enough to render a claim justiciable if the imminence of the threatened injury is inadequate--as is true here under *Navegar*.

Accordingly, because no plaintiff has demonstrated a threat of prosecution sufficiently imminent under circuit law, we have no justiciable case or controversy before us. Therefore, we do not reach the merits. The judgment of the district court is

Affirmed in part and reversed in part.

SENTELLE, *Circuit Judge, dissenting*: While I commend the balanced tone and thoroughness of the majority opinion, I find that after examining the authorities discussed therein, I reach a different conclusion. As the court relates, plaintiffs seek to challenge the provisions of the District of Columbia's Criminal Code limiting the possession of pistols, as violative of their Second Amendment rights to keep and bear arms. The District Court held that they had no standing. Today this court has affirmed.

I would find standing based on the authority of cases cited by the majority. The record offers essentially undisputed evidence of the appellants' intent to engage in gun-related conduct prohibited by the challenged Code provisions, but for the existence of those provisions. Appellants adequately allege

and argue that this conduct is protected by the Second Amendment to the United States Constitution.

The Supreme Court has said, as the majority quotes:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (citing *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973)) (internal quotation marks omitted). The majority's further analysis of *United Farm Workers* is directly on point:

> In *United Farm Workers*, a union challenged provisions of a state statute that made it an unfair labor practice, punishable with criminal penalties, to encourage consumer boycotts of agricultural products by the use of "dishonest, untruthful and deceptive publicity." 442 U.S. at 301, 99 S.Ct. 2301. The state argued that the criminal penalty provision had not yet been applied and might never be applied to unfair labor practices. *Id.* at 302, 99 S.Ct. 2301. The Court found standing, saying that "the State has not disavowed any intention of invoking the criminal penalty provision against

> unions that commit unfair labor practices," *id.*, and that the union's fear of prosecution was not "imaginary or wholly speculative," *id.* Thus *United Farm Workers* appeared to find a threat of prosecution credible on the basis that plaintiffs' intended behavior is covered by the statute and the law is generally enforced.

Maj. Op. at 7. As appellants allege a similarly realistic fear of prosecution, I would hold *United Farm Workers* controlling, and conclude that appellants have standing to bring the Second Amendment challenge.

As the majority notes, a long line of cases upholds pre-enforcement review of First Amendment challenges to criminal statutes by plaintiffs with bases for standing no different than that asserted by appellants herein for their Second Amendment challenge. For example, in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988), plaintiffs brought a suit challenging the constitutionality of a newly enacted Virginia statute criminalizing the display for commercial purposes of visual or written material that "depicts sexually explicit nudity, sexual conduct, or pseudo-masochistic abuse which is harmful to juveniles." Va.Code § 18.2-391(a) (Supp.1987). The Commonwealth of Virginia argued that plaintiffs lacked standing, because they had not yet been prosecuted under the Act. The Supreme Court, in discussing the standing question, declared itself "not troubled by the pre-enforcement nature of this suit." *American Booksellers*, 484 U.S. at 393, 108 S.Ct. 636. Because "the state ha[d] not suggested that the ... law will not be enforced," and the Court saw no reason to assume that

it would not be, the Court found standing, "conclud[ing] that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." *Id.* I see no distinction between that case and this.

As the Supreme Court further noted in *American Booksellers*, the danger of the statute before it could "be realized even without an actual prosecution." *Id.* Needless to say, the harm lay in self-censorship-that is, the curtailing of an otherwise constitutional activity because of an allegedly unconstitutional criminal statute. The only difference between that harm and the harm alleged in this case is that there it was to First Amendment interests, here to Second. I know of no hierarchy of Bill of Rights protections that dictates different standing analysis.

I acknowledge, as the majority notes, that a case from this circuit, *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C.Cir.1997), is in tension with "cases upholding pre-enforcement review of First Amendment challenges to criminal statutes." Maj. Op. at 1254. In *Navegar*, plaintiff-appellants sought declaratory judgment striking down as unconstitutional provisions of the Violent Crime Control and Law Enforcement Act of 1994, which outlawed firearm products manufactured by appellants, some by name, and others by description. While we found standing to challenge the regulation of the named products, we held there was no standing as to the products outlawed only by description. *See Navegar*, 103 F.3d at 1001. The *Navegar* court found the threat of prosecution under the provisions outlawing products by description insufficiently imminent to support standing on the record before it. Those latter provisions outlawed firearms in

language so general that the court found "it impossible to foretell precisely how these provisions may be applied." *Id.* Further, the *Navegar* court found insufficient evidence of the government's intent to enforce the "generic portions of the Act" against the specific parties before it. *Id.*

While I acknowledge that the majority is correct that *Navegar* can be read as controlling the case before us and barring standing, I think it is distinguishable. The allegedly constitutionally protected conduct in the record before us is clearly defined and clearly unlawful under a statute that the District apparently enforces regularly, and under which there is certainly no doubt that plaintiffs reasonably apprehend enforcement. I would therefore find the line of cases represented by *American Booksellers*, rather than *Navegar*, controlling.

For the reasons set forth above, I respectfully dissent.

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 04-5016 **September Term, 2004**

03cv00834

Filed On: June 21, 2005

Sandra Seegars, et al.,
Appellants

v.

Alberto Gonzales, Attorney General of the United States and Anthony A. Williams, Mayor, District of Columbia,

Appellees

Consolidated with 04-5081

BEFORE: Sentelle* and Tatel, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing filed March 14, 2005, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Michael C. McGrail

Deputy Clerk

*Circuit Judge Sentelle would grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 04-5016 **September Term, 2004**

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Filed On: June 21, 2005

Sandra Seegars, et al.,
Appellants

v.

Alberto Gonzales, Attorney General of the United States and Anthony A. Williams, Mayor, District of Columbia,

Appellees

Consolidated with 04-5081

BEFORE: GINSBURG, Chief Judge, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND, and ROBERTS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

ORDER

Appellants' petition for rehearing en banc and the

responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Michael C. McGrail

Deputy Clerk

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

Circuit Judges SENTELLE, RANDOLPH, and ROBERTS would grant the petition for rehearing en banc.

A statement of *Chief Judge* GINSBURG concurring in the denial of rehearing en banc is attached.

A statement of *Circuit Judge* SENTELLE dissenting in the denial of rehearing en banc is attached.

A statement of *Senior Circuit Judge* WILLIAMS is attached.

GINSBURG, *Chief Judge, concurring in the denial of rehearing en banc:*

The court properly denies the appellants' petition for rehearing because this case does not present a circumstance in which a plaintiff is "required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). The plaintiffs challenging the pistol regulation, as both the panel and the district court observed, *see* 396 F.3d 1248, 1256 (D.C. Cir.2005); 297 F.Supp.2d 201, 216-17 (D.D.C.2004), could have applied to register a pistol and then challenged the subsequent denial of that application on the basis of the Second Amendment in the courts of the District of Columbia, *see generally* D.C. CODE §§ 2-510(a), 7-2502.10(b), 7- 2507.09; *Fesjian v. Jefferson*, 399 A.2d 861, 863 (D.C.1979) (entertaining challenges under the Equal Protection Clause and the Takings Clause to D.C. gun statute upon appeal from denial of registration), and thereafter, if necessary in the Supreme Court of the United States, *see* 28 U.S.C. § 1257. Because the appellants have, as the Government argues, a ready means of presenting their constitutional challenge, it cannot fairly be said that a criminal prosecution is their "sole means of seeking relief."

Although the plaintiff challenging the trigger lock regulation apparently had no administrative remedy by way of which she could secure judicial review, her claim to standing is based only upon her averment that but for the regulation "she would remove the trigger lock when she deems it necessary to defend herself in her home." *Seegars*, 396 F.3d at 1256. That she would ever find it necessary to remove the trigger lock in

order to defend herself in her home, and that she would then be prosecuted for that action, are highly speculative propositions, and therefore insufficient to give her standing to sue. *See Whitmore v. Arkansas,* 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) ("Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact.").

SENTELLE, *Circuit Judge, dissenting from the denial of en banc*: With one distinct but significant exception, I concur in the ideas and reasoning expressed in the separate opinion of Senior Circuit Judge Williams. For the reasons expressed in my dissent in the panel opinion in this cause, *Seegars v. Gonzales,* 396 F.3d 1248, 1256 (D.C.Cir.2005), I do not accept the proposition that *Navegar, Inc. v. United States,* 103 F.3d 994 (D.C.Cir.1997), is controlling on the question of standing. With that one reservation, I join in the observations of Senior Circuit Judge Williams concerning the standing of appellants to bring this action and dissent from the denial of en banc.

WILLIAMS, *Senior Circuit Judge*: I write briefly to explain my call for rehearing en banc on the panel decision, which I wrote. As a panel we were constrained by recent circuit authority, *Navegar, Inc. v. United States,* 103 F.3d 994 (D.C.Cir.1997), even though, as my opinion for the court made clear, it appeared to be in conflict with an earlier Supreme Court decision, *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). The essential issue was whether plaintiffs' injury--their inability, on pain of criminal sanction, to possess and use guns that they believed critical for their self-defense--was sufficiently imminent to qualify for Article III standing. See *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The imminence of the threat to their security matched the imminence of the threat of prosecution; the greater the probability of enforcement, the greater the pressure to forego what they saw as lawful and needed security precautions. And the defendant governments in no way suggested any reluctance to enforce the laws to the hilt. Although the threat of prosecution appeared as imminent as in *United Farm Workers*, *Navegar* demanded a higher level of imminence, indeed one rarely attainable in practice.

When we asked the defendant governments to respond to the petition for rehearing en banc, they argued that all plaintiffs other than Hailes could seek permits to carry pistols under the statutes forbidding their desired conduct. The governments did not suggest that there was the remotest chance that the permits would be granted. The statutes plainly, unequivocally, bar issuance of such permits. See D.C. Code §§ 7-2502.01, 7-2502-02(a); *Seegars v. Gonzales*, 396 F.3d 1248, 1250 (D.C. Cir. 2005). That being so, it is mysterious to me how plodding through the charade of seeking permits would render the threat of prosecution (and thus the need to forego measures for their security) one iota more imminent. The probability of the laws' enforcement will be exactly the same after the administrative exercise as now. The availability of a null administrative remedy seems irrelevant to the standing issue.

Moreover, to frame the issue more closely in the terms of *United Farm Workers*, it is an illusion to suppose that pursuit of the administrative "remedies" identified by the defendant governments could alleviate the burden on plaintiffs of

"await[ing] and undergo[ing] a criminal prosecution as the sole means of seeking relief." *United Farm Workers,* 442 U.S. at 298. At the conclusion of that vain exercise they will face exactly the dilemma they do today--the choice between facing criminal prosecution and foregoing security measures they believe necessary and lawful.

As for Hailes, she lawfully possesses the weapon in question, and is forbidden from maintaining it loaded and assembled or free of a trigger lock. There being not even a useless administrative remedy available for Hailes, the governments argue that the risk of prosecution is too low, as her preferred course of conduct is entirely private and contingent on her feeling threatened in the future. This is true in every sense except the sense that counts. It is presumably true that, as a practical matter, she can maintain her weapon in her own home any way she likes, so long as she is discreet about it and so long as the occasion against which she wants to have it at the ready--intrusion by a burglar or other marauder--never arises. But if such an intrusion occurs, and she is able to defend herself by virtue of having violated the law, the ensuing police investigation will bring out the evidence of her crime (unless she were to successfully commit another crime by lying about how she kept the gun). Nothing the governments say suggests that the risk of prosecution will be low then. The risk of prosecution in the event of the contingency she fears is high, and thus the resulting deterrent to her freeing the trigger lock is effectively as great as if she proposed to violate the law down at the police station.

Moreover, the governments offer an apparently baseless suggestion that in the event of use against an intruder, Hailes

could successfully invoke self-defense. First, the law contains no such exception, and it is sheer speculation to suppose that courts would find it. Second, Hailes's whole problem is that her belief as to what is prudent for her safety and allowed by the Constitution differs from the District's view. The possibility of an undefined and possibly non-existent defense is no answer.

I do not think our law of standing requires that citizens who want to obey the law, but also to follow their judgment as to self-preservation, be told that they cannot get a reading on the validity of the law except by pursuing concededly useless administrative avenues or by engaging in forbidden behavior that is sure to be exposed if the risk they fear arises.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sandra SEEGARS, *et al.*,

Plaintiffs,

v. Civil Action No. 03-834(RBW)

John D. ASHCROFT,
Attorney General of the United States,
et al.,

Defendants.

ORDER

Upon consideration of the claims in the above-captioned case, and for the reasons set forth in the Memorandum Opinion accompanying this Order, it is hereby,

ORDERED that the defendants' motions to dismiss are **GRANTED**. It is

FURTHER ORDERED that this cause of action is hereby **DISMISSED.**

SO ORDERED this 14th day of January, 2004.

REGGIE B. WALTON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sandra SEEGARS, *et al.*,

Plaintiffs,

v. Civil Action No. 03-834(RBW)

John D. ASHCROFT,
Attorney General of the United States,
et al.,

Defendants.

AMENDED MEMORANDUM OPINION

The plaintiffs, five residents of the District of Columbia, have filed a complaint with this Court seeking "to vindicate the rights of residents of the District of Columbia to exercise the same rights accorded to American citizens in every State of the Union to keep and bear arms under the Second Amendment to the United States Constitution, which [the plaintiffs allege] guarantees the right of law-abiding citizens to keep handguns in the home for lawful defense of their families and other lawful purposes." Complaint ("Compl.") ¶ 1. The defendants, John D. Ashcroft, the Attorney General of the United States ("Attorney General"), and Anthony A. Williams, the Mayor of the District

of Columbia ("Mayor"), have both filed motions to dismiss the plaintiffs' complaint. The Attorney General asserts that because "[p]laintiffs have neither been prosecuted nor threatened with prosecution under the [challenged] statutes, nor have they even sought to obtain registration or licensing under the statutes[,]" they lack standing to pursue their claims and this case is therefore not ripe for review. Motion to Dismiss of Defendant Attorney General of the United States and Memorandum of Law in Support Thereof ("Att'y Gen.'s Mot.") at 1-3. The Mayor, on the other hand, asserts that the plaintiffs have failed to state a claim upon which relief can be granted because, among other reasons, the Second Amendment does not guarantee individuals a constitutional right to possess firearms.[1] Defendant Anthony A. Williams' Motion to Dismiss the Complaint, Memorandum of Points and Authorities in Support of Defendant Williams' Motion to Dismiss the Complaint ("Mayor's Mot.") at 1-6. Upon consideration of the parties' written submissions, the oral arguments of counsel,[2] and for the reasons set forth below, the Court finds that the plaintiffs' claims challenging the District of Columbia's statutes prohibiting the possession of pistols are non-justiciable and therefore must be dismissed. However, the Court finds that plaintiff Gardine Hailes' challenges to the District of Columbia statute which requires that she keep her shotgun either unloaded, disassembled or bound by a trigger lock are legally distinct from

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[1]The Court notes that the Mayor has "adopt[ed] and incorporate[d] by reference the argument[s] of the defendant Ashcroft as to the plaintiffs' lack of standing and the lack of ripeness and nonjusticiability of the plaintiffs' claims." *See* Reply of Defendant Williams to Plaintiffs' Opposition to Defendant's Motion to Dismiss ("Mayor's Reply") at 1.

[2]On October 8, 2003, this Court heard oral argument on the defendants' motions to dismiss.

the plaintiffs' challenges to the District of Columbia's statutes prohibiting the possession of pistols. Thus, the Court must consider whether Ms. Hailes has a viable Second Amendment claim. For the reasons outlined below, the Court concludes that the plaintiff is unable to maintain a Second Amendment challenge to the requirement regarding how she must maintain her legally possessed firearm, and, in any event, the Second Amendment does not apply to the District of Columbia. Accordingly, Ms. Hailes' challenges must also be dismissed.

I. Factual Background

As mentioned above, the plaintiffs are all resident of the District of Columbia. Plaintiff Sandra Seegars is a Commissioner of the District of Columbia Taxicab Commission and an elected Advisory Neighborhood Commissioner. Compl. ¶ 22. Ms. Seegars allegedly "resides in a high crime neighborhood, has been a crime victim, and wishes to obtain a pistol to defend herself in her home." *Id.* Plaintiff Gardine Hailes is an office manager and a former television show host who "currently possesses in her home a registered shotgun which she keeps bound by a trigger lock." Compl. ¶ 23. According to Ms. Hailes, her home and her neighbor's home have been burglarized and she wishes to "remove the trigger lock when she deems it necessary to defend herself in her home ... [and] also wishes to obtain a pistol to defend herself in her home." *Id.* Plaintiff Absalom F. Jordan, Jr., is an elected Advisory Neighborhood Commissioner and a National Rifle Association Certified Firearms Instructor. Compl. ¶ 24. Mr. Jordan purportedly "is a victim of [an] attempted armed robbery[,] ... [lives in] a major drug area[, and] is involved in efforts to expel drug dealers from [his] neighborhood." *Id.* Mr. Jordan also wishes to obtain a

pistol "and keep it at his residence for self protection." *Id.* Plaintiff Carmela B. Brown is a writer and an actor and claims that she "resides in a high crime neighborhood rife with open-air drug trafficking and prostitution, and wishes to obtain a pistol to defend herself in her home." Compl. ¶ 25. Finally, plaintiff Robert N. Hemphill is a retired postman and "wishes to obtain a pistol to defend himself in his home." Compl. ¶ 26.

The barrier to the plaintiffs' desires to legally possess pistols in the District of Columbia is section 7-2502.01 of the District of Columbia Code, which prohibits the possession of any firearm within the District of Columbia "unless the person or organization holds a valid registration certificate for the firearm."[3] D.C. Code § 7-2502.01 (2001). Firearm registration certificates, which may be issued under this statute to organizations involved in law enforcement, are not necessary for: (1) individuals involved in law enforcement or the armed forces while on duty, (2) a licensed dealer if such a firearm is acquired and kept with respect to that business, and (3) any nonresident of the District of Columbia "participating in any lawful recreational firearm-related activity in the District ...." *Id.* Furthermore, and of particular importance in this case, section 7-2502.02 of the District of Columbia Code states that "[a] registration certificate shall not be issued for a ... [p]istol not validly registered to the current registrant in the District prior to September 24, 1976 ...." D.C. Code § 7-2502.02 (2001). If the Chief of Police determines "that an application for a registration certificate should be denied ... [he] shall notify the applicant ...

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[3]In addition, District of Columbia Code § 7-2502.03 "prohibits the issuance of registration certificates to criminals, minors, and various individuals with mental or physical disabilities or addictions that might affect the person's suitability for safe and responsible possession of a firearm." Att'y Gen.'s Mot. at 4 (citing D.C. Code § 7-2502.03).

of the proposed denial ..., briefly stating the reason or reasons therefor." D.C. Code § 7-2502.10 (2001). A notice of the denial must then be served on the applicant, who

> shall have 15 days from the date the notice is served in which to submit further evidence in support of the application ...; provided, that if the applicant does not make such a submission within 15 days from the date of service, the applicant ... shall be deemed to have conceded the validity of the reason or reasons stated in the notice, and the denial of revocation shall become final.

Id. If the applicant timely submits further evidence in support of the application, the Chief of Police has ten days to serve upon the applicant a notice of his final decision. *Id.*

> The Chief's decision shall become effective at the expiration of the time within which to file a notice of appeal pursuant to the District of Columbia Administrative Procedure Act ... or, if such a notice of appeal is filed, at the time the final order or judgment of the District of Columbia Court of Appeals becomes effective.

Id. The prohibition against carrying firearms is set forth in Title 22 of the District of Columbia Code. Section 22-4504(a) of the Code provides, in part, that:

> No person shall carry within the District of Columbia either openly or concealed on or

> about their person, a pistol, without a license pursuant to District of Columbia law .... Whoever violates this section shall be punished as provided in § 22-4515, except that:
>
> (1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, ... in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than $5,000 or imprisoned for not more than 5 years, or both ....[4]

D.C. Code § 22-4504(a) (2001). Section 22-4515 of the District of Columbia Code provides: "Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than $1,000 or imprisonment for not more than 1 year, or both." D.C. Code § 22-4515 (2001).

The plaintiffs also challenge District of Columbia Code § 7-2507.02, which provides that "each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia." D.C. Code § 7-2507.02 (2001). A violation of D.C. Code § 7-2507.02 is punishable by imprisonment for up to one year and a fine of up to $1,000. *See* D.C. Code § 7-2507.06 (2001).

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[4]The potential penalties are doubled if a "violation of this section occurs after a person has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or another jurisdiction ...." D.C. Code § 22-4504(a) (2001).

II. Standard of Review

Federal Rule of Civil Procedure 12(b)(1) requires the plaintiffs to establish by a preponderance of the evidence that the court has jurisdiction to entertain their claims. Fed. R. Civ. P. 12(b)(1); *Grand Lodge of Fraternal Order of Police v. Ashcrofi*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (holding that while the plaintiff has the burden of establishing the court's jurisdiction, the court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority."); *Pitney Bowes, Inc. v. United States Postal Serv.*, 27 F. Supp. 2d 15, 18 (D.D.C. 1998); *Darden v. United States*, 18 Cl. Ct. 855, 859 (Cl. Ct. 1989). While the Court must accept as true all the factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1), *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), because the plaintiffs have the burden of establishing that the Court has jurisdiction, the "'plaintiff[s'] factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge of Fraternal Order of Police*, 185 F. Supp. 2d at 13-14 (citation omitted). Finally, the Court notes that in deciding a 12(b)(1) motion, it is well established in this Circuit that a court is not limited to the allegations in the complaint but may consider material outside of the complaint in an effort to determine whether the court has jurisdiction in the case. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624-25 n.3 (D.C. Cir. 1997); *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987); Hohri v. United States, 782 F.2d 227, 241 (D.C. Cir. 1986); *Grand Lodge of Fraternal Order of Police*, 185 F.

Supp. 2d at 14.

III. Legal Analysis

Interestingly, the defendants in this case seek dismissal of the case on two separate and distinct grounds. The Attorney General asserts that the plaintiffs' claims are non-justiciable and this case should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) because the plaintiffs lack standing to challenge the statutory provisions under attack and their claims are not ripe for review. In addition, in a footnote, the Attorney General states:

> [i]t is the position of the United States that the Second Amendment 'protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse.'

Att'y Gen.'s Mot. at 13 n.11 (quoting Brief for Respondent in Opposition to Petition for a Writ of Certiorari at 19-20 n.3, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002)). On the other hand, the Mayor seeks dismissal of the plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6) on the ground that the Second Amendment does not guarantee an individual a constitutional right to possess firearms. Mayor's Mot. at 1-6. In *Ex Parte*

McCardle, 7 Wall. 506 (1868), the Supreme Court stated that

> [w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Id. at 514. Accordingly, the Court must first determine whether it has jurisdiction to entertain the plaintiffs' challenges.

(1) **Are the Plaintiffs' Pre enforcement Challenges to the District of Columbia Statutes Regulating the Possession and Maintenance of Firearms Justiciable?**

In *Mahorner v. Bush*, 224 F. Supp. 2d 48 (D.D.C. 2002) (Walton, J.), *aff'd*, No. 02-5335, 2003 WL 349713, at *1 (D.C. Cir.) (per curiam), *cert. denied*, 123 S. Ct. 2654 (2003), this Court recently reiterated that:

> [i]t is a fundamental axiom that pursuant to Article III of the Constitution, federal courts are vested with the power of judicial review extending only to 'Cases' and 'Controversies.' U.S. Const. art. III, § 2. As a result of the Constitution's 'case-or-controversy requirement, the courts have developed a series of principles termed 'justiciability doctrines,' among which are standing[,] ripeness, mootness, and the political

question doctrine.'

Id. at 49 (quoting *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984))). In this case, two of these justiciability doctrines are implicated: standing and ripeness.

For a plaintiff to have Article III standing to bring a claim in federal court, the plaintiff bears the burden of establishing that he or she has suffered "an (1) 'injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical' -- (2) which is 'fairly traceable' to the challenged act, and (3) 'likely' to be 'redressed by a favorable decision.'" *Id.* at 49-50 (quoting *National Treasury Employees*, 101 F.3d at 1427 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992))). However, even if these

> requisites for Article III standing are present, a federal court may still deny standing under certain 'prudential' principles. Standing may be denied on prudential grounds, for example, to litigants who present abstract questions of wide public significance that would more appropriately be addressed by the representative branches of government ....

Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997) (citations omitted). In *Navegar, Inc. v. United States*, the District of Columbia Circuit explained that

> [a] related component of justiciability which is

> particularly relevant in the context of actions for *preenforcement review* of statutes is 'ripeness,' which focuses on the timing of the action rather than on the parties seeking to bring it. In deciding whether a case is ripe for adjudication, federal courts generally consider the hardship to the parties of withholding court resolution (a factor that overlaps with the 'injury in fact' facet of [the] standing doctrine), and the fitness of the issues for judicial decision (a factor that resembles the prudential concerns applied in the standing context). By refusing to hear disputes which are not yet ripe, federal courts avoid becoming entangled in 'abstract disagreements,' enhance judicial economy, and ensure that a record adequate to support an informed decision exists when the case is heard.

Id. The District of Columbia Circuit also noted that "[f]ederal courts most frequently find preenforcement challenges justiciable when the challenged statutes allegedly 'chill' conduct protected by the First Amendment, but preenforcement challenges have been heard outside of the First Amendment context as well." *Id.* at 999 (citations omitted).

Here, the plaintiffs' claims amount to a preenforcement challenge, as they have "neither been prosecuted nor threatened with prosecution under the [D.C.] statutes," and, except for one of the plaintiffs,[5] they do not even own a pistol and have never

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[5]Plaintiff Jordan purportedly owns a pistol that he stores outside of the District of Columbia, Compl. ¶ 24, and has allegedly been denied a license to possess a pistol in the District of Columbia on two separate occasions over twenty-five years ago. *See Jordan v. District of Columbia,*

applied for a registration certificate for a pistol under the governing statutes. Att'y Gen.'s Mot. at 1. In *Navegar*, the District of Columbia Circuit stated that

> [e]ven when the criminal statute that a litigant challenges has not yet been enforced against her, the challenger's claim may be justiciable if the challenger can demonstrate that she faces a threat of prosecution under the statute which is *credible and immediate*, and not merely abstract or speculative. In the proper circumstances, such threats of enforcement can simultaneously ripen a preenforcement challenge and give the threatened party standing.

103 F.3d at 998 (emphasis added) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979); *American Library Ass'n v. Barr*, 956 F.2d 1178, 1196 (D.C. Cir. 1992)). This is because

> [a] credible threat of imminent prosecution can injure the threatened party by putting her between a rock and a hard place - - absent the availability of preenforcement review, she must either forego possibly lawful activity because of her well-founded fear of prosecution, or willfully violate the statute, thereby subjecting herself to criminal prosecution and punishment.

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362 A.2d 114 (D.C. 1976); *Jordan v. District of Columbia Bd. of Appeals and Review*, 315 A.2d 153, 155 (D.C. 1974).

Id. (citing Babbitt, 442 U.S. at 298-99).

The Circuit Court's analysis in *Navegar* is particularly helpful in resolving whether the plaintiffs in this case have standing to assert their preenforcement challenges. In *Navegar*, the plaintiffs challenged certain provisions of the Violent Crime Control and Law Enforcement Act of 1994 ("Crime Control Act"), Pub. L. No. 103-322, 108 Stat. 1796, which proscribed the

> 'manufacture, transfer, or possess[ion of] a semiautomatic assault weapon,' and defined 'semiautomatic assault weapon' to include 'any of the firearms, or copies or duplicates of the firearms in any caliber, known as ... INTRATECTECT-9, TEC-DC9 and TEC-22; and ... revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12.'

Navegar, 103 F.3d at 997 (quoting 18 U.S.C. §§ 921(a)(30)(A), 922(v)(1)). The Crime Control Act also defines a "semiautomatic weapon" to include "semiautomatic pistols that have 'an ability to accept a detachable magazine' and at least two of five other specified characteristics." *Id.* (quoting 18 U.S.C. § 921(a)(30)(C)). In addition, the Crime Control Act outlaws "the transfer or possession of any large capacity ammunition feeding device,' which ... [is] defined to include ammunition magazines manufactured after the date of enactment of the Act which can hold more than ten rounds of ammunition." *Id.* (citing 18 U.S.C. §§ 921(a)(31), 922(w)(1)). Under the Act, "[u]nits lawfully possessed on the effective date of the Act are 'grandfathered,' meaning they may lawfully be transferred and

possessed after the Act's passage." *Id.* (citing 18 U.S.C. §§ 922(v)(2), (w)(2)).

Following the enactment of the Crime Control Act, the plaintiffs, two federally-licensed firearms manufacturers - Navegar, Inc. (doing business as "Intratec") and Penn Arms, Inc. - were visited by agents from the Bureau of Alcohol, Tobacco and Firearms ("ATF")[6] on the same day the Crime Control Act became effective. *Id.* The agents "informed officers of these companies of the prohibitions [contained in the Crime Control Act], and gave notice that they planned to conduct inventories of the weapons that would be 'grandfathered' under the Act. Over the next two days, ATF inspection agents conducted these inventories." *Id.* Ultimately, "the ATF sent a letter to [the plaintiffs] and other firearms manufacturers which summarized the [Act's] prohibitions." *Id.* The district court granted the government's motion for summary judgment, finding that the plaintiffs' "complaint did not set forth a justiciable controversy as required by Article III of the United States Constitution, because the plaintiffs had failed to demonstrate that they faced a genuine 'threat of prosecution.'" *Id.* at 996-97. The Circuit Court separated the appellants' claims into two categories: (1) those claims that challenged portions of the Crime Control Act that refer to specific brand names and models, and (2) those claims that challenged portions of the Crime Control Act that generally identify prohibited materials by characteristics. *Id.* at 999. Addressing the challenge to the Crime Control Act's provisions that refer to specific brand names and models, the *Navegar* Court found that [t]he most

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[6]The Court notes that the name of the Bureau of Alcohol, Tobacco and Firearms was recently changed to the Bureau of Alcohol, Tobacco, Firearms and Explosives pursuant to the Homeland Security Act, Pub. L. 107-296.

important circumstance that the district judge overlooked

> [was] that the Act in effect singles out the appellants as its intended targets, by prohibiting weapons that only the appellants make[, *i.e.*, INTRATECTECT-9, TEC-DC9 and TEC-22; and ... revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12].

Id. at 1000. This was significant because "if these provisions of the statute are enforced at all, they will be enforced against these appellants for continuing to manufacture and sell specified weapons ...." *Id.* The Circuit Court went on to comment that

> [t]o conclude that the appellants face no credible threat of prosecution under these portions of the Act, we would have to believe that the government would enact a widely publicized law targeting products that only the appellants make, send its agents to the appellants' facilities on the day of enactment to inform them of the law's prohibitions and to begin quarantining 'grandfathered' units, and soon thereafter remind appellants of the provisions of the Act by letter, but then sit idly by while the appellants continued to manufacture the outlawed weapons. To imagine that the government would conduct itself in so chimerical a fashion would be to declare in effect that federal courts may never, in the absence of an explicit verbal 'threat,' decide preenforcement challenges to criminal statutes. This has never been the law.

> To require litigants seeking resolution of a dispute that is appropriate for adjudication in federal court to violate the law and subject themselves to criminal prosecution before their challenges may be heard would create incentives that are perverse from the perspective of law enforcement, unfair to the litigants, and totally unrelated to the constitutional or prudential concerns underlying the doctrine of justiciability.

Id. at 1000-01.

While the *Navegar* Court found that the appellants had standing to challenge the Crime Control Act's provisions that referenced and specifically targeted the weapons manufactured only by the appellants, it also held that the appellants lacked standing to challenge the second category of claims, *i.e.*, those that referred to the generic portions of the Act. *Id.* In this regard, the Court concluded that the threat of prosecution under the generic provisions of the Crime Control Act was "too remote and speculative" because, while

> appellants can point to some of the same circumstances that we found relevant to the justiciability of their challenges to the portions of the Act that name individual weapons, including the high-profile nature of their business and the publicity accorded to the Act, the visits by the ATF agents, and the letter from the ATF[,] ... they cannot invoke the one factor that we found most significant in our analysis of the other challenges - - the statute's own identification of

> particular products manufactured only by the appellants. In the absence of this factor, the threat of prosecution becomes far less imminent, and these parties' claims to standing concomitantly much weaker. These generic portions of the Act could be enforced against a great number of weapon manufacturers or distributors, and although the government has demonstrated its interest in enforcing the Act generally, nothing in these portions indicates any special priority placed upon preventing these parties from engaging in specified conduct.

Id. at 1001-02.

The Circuit Court's opinion in *Navegar* comports with decisions of other circuits. In *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996), a case that also involved a challenge to the Crime Control Act, the Ninth Circuit found that the plaintiffs' alleged injuries were not "actual or imminent" or "concrete and particularized" enough to confer standing. *Id.* at 1127. The plaintiffs - the San Diego County Gun Rights Committee, the San Diego Militia, the president of the San Diego Militia, a licensed federal firearms dealer, and a retired Marine Corps officer - all challenged the Crime Control Act, although none had been prosecuted, arrested or incarcerated for violating the Act. *Id.* at 1124. Most notably for the purposes of this case, the Ninth Circuit concluded that the plaintiffs were unable to bring a preenforcement challenge to the statute because they were unable to show a "*genuine* threat of *imminent* prosecution[.]" *Id.* at 1126 (citations omitted). This was due to the plaintiffs' failure to even "identify a general threat

of prosecution made against them. [In fact the p]laintiffs concede[d] that they ha[d] not been threatened with arrest, prosecution or incarceration." *Id.* at 1127. The Ninth Circuit noted that while "[a] specific warning of an intent to prosecute under a criminal statute may suffice to show imminent injury and confer standing [,] ... a general threat of prosecution is not enough to confer standing." *Id.* (citations omitted). In *San Diego County Gun Rights*, the Ninth Circuit concluded that the "[p]laintiffs [] established at most a possibility of their eventual prosecution under the Crime Control Act, which is clearly insufficient to establish a 'case or controversy.'" *Id.* at 1128 (citations omitted). In addition, the Ninth Circuit pointed out that the plaintiffs had "merely assert [ed] that they '*wish and intend* to engage in activities prohibited by [the Act]' ... [and thus] failed to show the high degree of immediacy that is necessary for standing under these circumstances." *Id.* at 1127 (citing *Lujan*, 504 U.S. at 564-65)) (emphasis added). The *San Diego County Gun Rights* Court also noted that the "existence of a 'chilling effect' ... has never been considered a sufficient basis, in and of itself, for prohibiting ... [government] action. The only exception to this general rule has been the relaxed standards for over breadth facial challenges involving protected speech." *Id.* at 1129 (citations omitted) (alteration in original).

The Sixth Circuit has also addressed a preenforcement challenge to the Crime Control Act. In *National Rifle Association of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997), the Sixth Circuit considered s challenge to the Crime Control Act advanced by several groups of plaintiffs, including manufacturers, firearms dealers and individuals.[7] Addressing the

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[7]In addition, there were two "nonprofit gun rights associations" that were plaintiffs in *Magaw*. 132 F.3d at 278. The Sixth Circuit

manufacturers and firearms dealers first, the *Magaw* Court noted that its decision that these plaintiffs had standing was "consistent with the opinion in the Court of Appeals for the District of Columbia in *Navegar* ...[,]" 132 F.3d at 283, as it found that these plaintiffs "demonstrated sufficient injury-in-fact to confer standing" not only because of economic harm that they would incur with the termination of the manufacturing and sale of the prohibited weapons, *id.* at 281-82, but also because they would face "serious criminal penalties." *Id.* at 283. The *Magaw* Court also found that the plaintiffs' challenge was ripe for review because "actual or imminent enforcement is not always a prerequisite in non-First Amendment cases, if the statute creates a 'present harm,' such as substantial economic injury." *Id.* at 285. Looking to the Supreme Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977), for guidance, the Sixth Circuit evaluated the plaintiffs' challenge by examining the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* The *Magaw* Court found that it had before it "a classic example of when pre-enforcement review must be granted" not only because of the well-founded fear of prosecution as explained in *Navegar*, *id.* at 288-90, but also because "[a]bsent the availability of pre-enforcement review, these plaintiffs must either terminate a line of business, make substantial expenditures in order to comply with the Act, or willfully violate the statute and risk serious criminal penalties." *Id.* at 287. Notably, however, the *Magaw* Court found that the individual plaintiffs

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dismissed the claims of these associations because they failed to submit declarations or affidavits "alleg[ing] an injury-in-fact sufficient to confer standing in the individual member's own right," and thus lacked standing to sue on their own behalf. *Id.* at 294-95.

did not have standing to sue. *Id.* at 293-94. The Sixth Circuit, stating that the economic harm rationale underlying its finding that the manufacturers and dealers had standing was absent with respect to the individual plaintiffs, observed that

> [t]he individual plaintiffs aver that they 'desire' and 'wish' to engage in certain possibly prohibited activities, but are 'restrained' and 'inhibited' from doing so. They allege that they 'are unable and unwilling, in light of the serious penalties threatened for violation of the statute, to obtain and possess the firearms and large capacity ammunition feeding devices prohibited by the statute.' Although the standing requirement of an injury-in-fact is fairly lenient and may include a wide variety of economic, aesthetic, environmental, and other harms, the individual plaintiffs herein allege merely that they would like to engage in conduct, which might be prohibited by the statute, without indicating how they are currently harmed by the prohibitions other than their fear of prosecution. Plaintiffs' assertions that they 'wish' or 'intend' to engage in proscribed conduct is not sufficient to establish an injury-in-fact under Article III. The mere possibility of criminal sanctions applying does not in and of itself create a case or controversy.

Id. at 293. (internal quotation marks and citations omitted). The *Magaw* Court went on to note that the individual plaintiffs' claim that the Crime Control Act had a chilling effect on their

ability to purchase the prohibited weapons did not establish standing because

> [e]very criminal law, by its very existence, may have some chilling effect on personal behavior. That is the reason for its passage.' *Doe v. Durling*, 782 F.2d 1202, 1206 (4th Cir. 1986).... Except for cases involving core First Amendment rights, the 'existence of a 'chilling effect' ... has never been considered a sufficient basis, in and of itself, for prohibiting' [government action]. *Younger v. Harris*, 401 U.S. 37, 51 (1971).

Id. at 294. Finally, the Sixth Circuit commented that

> [p]laintiffs' allegations of fear of prosecution, which thwarts their desire to possess or transfer prohibited products, affects not only the named plaintiffs, but also anyone desiring to possess the products proscribed by the Crime Control Act. The Supreme Court has refrained from adjudicating 'generalized grievances,' pervasively shared. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982). The individualized plaintiffs' alleged harm amounts to no more than a 'generalized grievance' shared in substantially equal measure by ... a large class of citizens,' and thus does not warrant the exercise of jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Id.

Here, the plaintiffs contend that they "are in a situation similar to those in" *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522 (6th Cir. 1998). *See* Plaintiffs' Memorandum in Opposition to Motion to Dismiss of Defendant Attorney General of the United States ("Pls.' Opp'n to Att'y Gen.'s Mot.") at 22. The Court cannot agree with this position. In *Peoples Rights Organization*, the plaintiffs, an organization and two of its members, brought a preenforcement challenge to a Columbus, Ohio city ordinance that prohibited the sale or possession of all assault weapons.[8] 152 F.3d at 527-28. The Sixth Circuit there began its analysis by examining its recent decision in *Magaw*, 132 F.3d 272, and concluded that its finding that the plaintiff had standing was consistent with the conclusions reached in *Magaw*. As explained above, in *Magaw*, three groups of plaintiffs challenged the Crime Control Act. The *Peoples Rights Organization* Court observed that the *Magaw* Court found that the firearms manufacturers and dealers had standing because of "substantial economic hardship," but that the two other groups, the individual plaintiffs and the associations, lacked standing because they suffered no injury-in-fact, as they simply alleged "that they 'desire[d]' and 'wish[ed]' to engage in certain possibly prohibited activities, but are 'restrained' and 'inhibited' from doing so." *Peoples Rights Org.*, 152 F.3d at 529 (quoting *Magaw*, 132 F.3d at 293). On the other hand, in *Peoples Rights Organization*, the individual plaintiffs, *id.* at 528, and a "large number [of the organization's]

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[8]Columbus City Code Section 2323.11(G) set forth five definitions of what constituted an "assault weapon." *Peoples Rights Org.*, 152 F.3d at 525- 26 n.1 (quoting Columbus City Code Section 2323.11(G)).

members who reside[d] in Columbus ... possess[ed], display[ed], s[old], l[oaned], or acquire[d] semiautomatic rifles, handguns, shotguns, and parts." *Id.* at 526. The complaint alleged that the individual plaintiffs, *id.* at 528, and the organization's "members [were] unable to determine whether such firearms and parts are 'assault weapons' under the Columbus ordinance[,]" *id.* at 526, and accordingly they had failed to register their firearms as authorized by the ordinance's grandfather clause. *Id.* at 528. The Sixth Circuit found that the plaintiffs had standing to pursue their vagueness challenge to the Columbus City ordinance, which was "not subject to any type of clarifying interpretation by a local administrative agency[,]" *id.* at 530, because they were able to show "the significant possibility of future harm" as they were unsure of whether the weapons they currently possessed were prohibited. *Id.* at 530-31. Thus, because the *Peoples Rights Organization* plaintiffs could not and had no means of determining whether their weapons were prohibited, they faced a choice of "either possess[ing] their firearms in Columbus and risk prosecution under the City's law, or, alternatively, they c[ould] store their weapons outside the City, depriving themselves of the use and possession of the weapons." *Id.* at 529.

Such is not the case here. Not only are the District of Columbia statutes not being challenged on vagueness grounds, which if was the case would present the same need for judicial interpretation as in *Peoples Rights Organization*, but the immediacy and reality of future harm found to exist in *Peoples Rights Organization* is absent here, as was also the situation in *Magaw*. The *Peoples Rights Organization* Court found that the plaintiffs there had standing because they currently possessed firearms that were located in the city and possibly covered by the Columbus City ordinance, which is markedly different from

the circumstances in *Magaw* and in this case, where the individual plaintiffs simply wish or desire to possess prohibited firearms within this jurisdiction. Thus, the plaintiffs in *Peoples Rights Organization* did not have the same type of "generalized grievances" shared not only by the "named plaintiffs" in *Magaw*, "but also anyone desiring to possess the products proscribed by the Crime Control Act." 132 F.3d at 294. And, as the *Magaw* Court noted, "[t]he Supreme Court has refrained from adjudicating 'generalized grievances,' pervasively shared." *Id.* (citing *Valley Forge*, 454 U.S. at 474-75).

(A) **The Plaintiffs' Challenges to the District of Columbia Statutory Regulation of the Possession of Firearms**

In this case, the plaintiffs have suffered no injury as a result of the District of Columbia's proscriptive gun control statutes. First, they are unable to point to any "credible threat of imminent prosecution ...." *Navegar*, 103 F.3d at 998. While this Court noted during the oral argument on the defendants' motions to dismiss that the government actively enforces the prohibition against the possession of pistols in the District of Columbia, case law is clear and unequivocal that for a plaintiff to have standing to pursue a preenforcement challenge outside of the First Amendment context, the threat of prosecution must be *imminent*. See *Magaw*, 132 F.3d at 279; *Navegar*, 103 F.3d at 998; *San Diego County Gun Rights*, 98 F.3d at 1126; *Duling*, 782 F.2d at 1206 (noting that to establish standing, "[a] litigant must show more than the fact that state officials stand ready to perform their general duty to enforce [the] laws[.]") (citing *Poe v. Ullman*, 367 U.S. 497, 501 (1961); *Watson v. Buck*, 313 U.S. 387, 399 (1941)). A generalized grievance, which is presumably

shared with many other citizens of the District of Columbia, without an imminent threat of prosecution or another type of injury-in-fact (*i.e.*, economic harm), is not sufficient to confer standing to the plaintiffs. The plaintiffs here stand in the same footing as the individual plaintiffs in *Magaw* and each of the plaintiffs in the *San Diego County Gun Rights* case, as they each simply state that they desire or wish to obtain pistols that they would possess in the District of Columbia. *See* Compl. ¶¶ 22-26. These assertions are clearly insufficient to establish injury-in-fact under Article III.

Second, the plaintiffs' claims are not ripe for review because, as indicated above, only one of the plaintiffs has ever even applied for a registration certificate.[9] Although the plaintiffs suggest that pursuing registrations would be futile,[10] *see* Pls.' Opp'n to Att'y Gen.'s Mot. at 27-31, the plaintiffs cannot avoid pursuing the existing regulatory process. *Cf. Poulos v. New Hampshire*, 345 U.S. 395, 409 & n.13 (1953) (noting that an individual cannot use futility as a defense to a

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[9]As the Court stated above, plaintiff Jordan's two applications were denied over twenty-five years ago. Thus, aside from the obvious statute of limitations concerns that arise from these stale denials, there is no prohibition against Jordan filing another application to register a pistol and, if it is again denied, pursuing a challenge through the District of Columbia's formal review process discussed below and outlined in D.C. Code §§ 7- 2507.09-10 (2001).

[10]While the Court needs not determine whether the pursuit of registrations by the plaintiffs would in fact be futile, the Court notes that aside from the previously mentioned exceptions to the registration requirement, see D.C. Code § 7-2502.01, Title 24 of the District of Columbia Municipal Regulations § 2303.9(c) permits the Chief of Police to issue a registration certificate to individuals who "[h]ave reason to fear injury to his or her person or property or any other proper reason." D.C. Mun. Regs. tit. 24, § 2303.9(c) (2001).

criminal prosecution when he has failed to apply for a license and that the proper course of action was to "seek[] a review in the civil courts of the licensing authority's refusal to issue him a license."). Here, as stated above, the District of Columbia Code provides a formal review process if an applicant is denied a registration certificate for a firearm. *See* D.C. Code § 7-2502.10. And, particularly important in this case, section 7-2507.09 of the District of Columbia Code provides that "[t]he provisions of the District of Columbia Administrative Procedure Act ("DCAPA") (§ 2-501 et seq.) shall apply to each proceeding, decision, or other administrative action specified in this unit ...." Thus, the plaintiffs are able to challenge a denial of their applications for registration certificates under the DCAPA and raise constitutional challenges to the District of Columbia's enactment and enforcement of the statutes at issue in this lawsuit pursuant to this statute. *See, e.g., McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978) (plaintiffs challenged the Firearms Control Regulations Act under both the DCAPA and the United States Constitution). Moreover, applying the criteria for assessing ripeness as set forth in *Abbott Labs*, 387 U.S. at 149, further demonstrates that this case is not ripe for review. The plaintiffs are unable to establish any hardship that they would sustain by utilizing the prescribed administrative process and awaiting an actual case or controversy should their applications be denied. Furthermore, the District of Columbia Circuit recognizes that under certain circumstances there exists prudential reasons to dismiss a case on justiciability grounds. In *Martin Tractor Co. v. FEC*, 627 F.2d 375 (D.C. Cir. 1980), the Circuit Court noted that "[r]ipeness enters the Article III 'case or controversy' picture in the determination whether the requisite injury is in sharp enough focus and the adverseness of the parties concrete enough to permit a court to decide a real

controversy and not a set of hypothetical possibilities." *Id.* at 379. The *Martin Tractor Co.* Court stated that

> [b]ecause of the great gravity and delicacy of (the courts') function in passing upon the validity of an act of Congress, the need is manifest for a full-bodied record in such adjudication. *United States v. UAW*, 352 U.S. 567 (1957) ... emphasized the importance of a detailed factual record upon which a court might limit, frame and perhaps avoid a constitutional decision.

Id. at 380 (internal citations and quotation marks omitted). Here too, this Court must be cautious in assessing the validity of the District of Columbia's statutes being challenged, as they are not only the product of the District of Columbia Council, but also congressional approval. A more fully developed factual record in which the plaintiffs have actually been harmed by an adverse ruling or a credible threat of imminent prosecution is therefore necessary to pursue an "as applied" challenge.[11] Accordingly,

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[11]While the plaintiffs' counsel would not concede at oral argument that the challenged statutes are constitutional on their face, this Court cannot imagine that the statutes would not survive a facial challenge. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid ...."). Surely, for example, the District of Columbia can prohibit convicted violent offenders from possessing handguns. *See Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (Such legislative proscriptions "are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties.").

the plaintiffs do not have standing to challenge sections 7-2502.02 and 22-4504(a) of the District of Columbia Code, nor are such claims ripe for review at this time.[12]

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[12]Because this Court finds that the plaintiffs lack standing to challenge sections 7-2502.02 and 22-4504(a) of the District of Columbia Code, it will dismiss the challenges to these statutes being advanced by each of the plaintiffs. In addition, the Court notes that plaintiffs Seegars, Jordan, Brown, and Hemphill do not have standing to challenge D.C. Code § 7- 2507.02. This is not only because of all the reasons expressed by the Court with respect to their other challenges, but also because there are simply no allegations in their complaint about how they are harmed by a statute that regulates the manner in which firearms must be maintained when they do not already possess any firearms in the District of Columbia that are subject to the requirements of D.C. Code § 7-2507.02. Accordingly, the only remaining challenges that this Court needs to address are those to D.C. Code § 7- 2507.02 raised by plaintiff Hailes, which are contained in Count One (Second Amendment), Count Two (D.C. Code § 1-303.43), and Count Three (42 U.S.C. § 1981(a)). However, the Court needs not spend a substantial amount of time on Counts Two and Three because as to these claims the plaintiff has failed to state a claim upon which relief can be granted, as it is "beyond doubt that the plaintiff can prove no set of facts in support of h[er] claim[s] which would entitle h[er] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). First, it is clear that plaintiff Hailes' "claim under section 1981 must ... fail in the absence of racially motivated discrimination. This section, taken from the Civil Rights Act of 1866, is directed solely at racial discrimination." *Lewis v. Green*, 629 F. Supp. 546, 552 (D.D.C. 1986) (citing *Nat'l Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Sup p. 1224 (D.D.C.), *aff'd without opinion*, 556 F.2d 76 (D.C. Cir. 1977); *Woods v. State*, 469 F. Sup p. 1127 (S.D.N.Y.), *aff'd without opinion*, 614 F.2d 1293 (2d Cir. 1979)). Thus, the Court will dismiss Count Three because plaintiff Hailes has failed to assert that she was purposefully discriminated against based on her race. Second, plaintiff Hailes' claim that D.C. Code § 7- 2507.02 violates D.C. Code § 1-303.43 because it is not a "usual and reasonable police regulation[] ... necessary for the regulation of firearms," D.C. Code § 1-303 43, is also without merit. In *McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978), the District of Columbia Court of Appeals dealt with a similar challenge to the Firearms Control Regulations Act (the "Act"), D.C. Code §§ 7-2501.01, *et seq.* (2001). In that case, the appellants asserted that the Act did not

(B) **Plaintiff Hailes' Challenges to the District of Columbia Statutory Regulation of the Maintenance of Firearms**

As stated above, aside from challenging the District of Columbia statute that prevents the plaintiffs from lawfully possessing pistols in the District of Columbia, plaintiff Hailes has also lodged challenges to section 7-2507.02 of the District of Columbia Code, which provides that "each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia." D.C. Code § 7-2507.02. The complaint in this case asserts that plaintiff Gardine Hailes "currently possesses in her home a registered shotgun which she keeps bound by a trigger lock. But for D.C. Code § 7-2507.02, she would remove the trigger lock when she deems it necessary to defend herself in her home." Compl. ¶ 23.

The Court finds that plaintiff Hailes' challenge to section 7-2507.02 is legally distinct from the plaintiffs' challenges to the District of Columbia statute that regulates the possession of

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constitute a legitimate exercise of authority by the District of Columbia Council pursuant to D.C. Code § 1-303.43. *McIntosh*, 395 A.2d at 749-50. In disagreeing with the appellants' position, the Court of Appeals found that the "validity of the Firearms Act can be sustained under [what at that time was] the Council's newly conferred power set forth in § [1-204.04] of the Home Rule Act ...." *Id.* at 750. This Court agrees and therefore must dismiss Count Two. Thus, the Court needs not address whether Ms. Hailes would have standing to assert challenges to D.C. Code § 7-2507.02 pursuant to 42 U.S.C. § 1981(a) and D.C. Code § 1-303.43, as she clearly has failed to state claims upon which relief can be granted based on these two statutes.

pistols. In concluding that the plaintiffs' challenges to the statutory regulation of the possession of pistols were non-justiciable, the Court reasoned that the plaintiffs lacked standing because they were unable to show a "genuine threat of imminent prosecution," as they simply stated that they desire and wish to possess pistols in the District of Columbia. Moreover, their claims are not ripe for review because they have never even applied for firearm registrations or utilized the District of Columbia's formal review process that is available to unsuccessful applicants. *See* D.C. Code § 7-2502.10. However, with respect to plaintiff Hailes' challenge to section 7-2507.02's regulation concerning how registered firearms must be maintained, Hailes already possesses a registered shotgun in the District of Columbia, Compl. ¶ 23, and is therefore obligated to have it secured by a trigger lock if it is not unloaded and disassembled. Plaintiff Hailes states in her complaint that "[b]ut for D.C. Code § 7-2507.02, she would remove the trigger lock when she deems it necessary to defend herself in her home[,]" *id.*, and that "[a]s a proximate cause of D.C. Code § 7- 2507.02 and the enforcement thereof ... [she] is subjected to irreparable harm in that she is unable, no matter what the circumstances, to keep her registered shotgun in a manner ready for use to protect herself in her own home from attack by violent intruders." Compl. ¶ 30. And, plaintiff Hailes contends that the requirements of section 7-2507.02 infringe on her right "to keep and bear arms as guaranteed by the Second Amendment." *Id.* ¶ 36. Thus, Ms. Hailes must forego maintaining her shotgun in the manner she desires because of D.C. Code § 7-2507.02. Moreover, as the Attorney General acknowledges, "[u]nlike ... the other claims she has brought in this case ...[,] Ms. Hailes would not appear to have an administrative avenue that she could pursue against the District to obtain eventual court review

of her claims with respect to the lawfulness of § 7-2507.02." Memorandum of Defendant Attorney General of the United States in Response to Order of October 16, 2003 at 8 n.5.

In *Navegar*, the District of Columbia Circuit stated that

> [t]o require litigants seeking resolution of a dispute that is appropriate for adjudication in federal court to violate the law and subject themselves to criminal prosecution before their challenges may be heard would create incentives that are perverse from the perspective of law enforcement, unfair to the litigants, and totally unrelated to the constitutional or prudential concerns underlying the doctrine of justiciability.

103 F.3d at 1000-01. This is Hailes' predicament. Absent the availability of an administrative mechanism to seek review of the trigger lock requirement, Ms. Hailes would be left in a precarious dilemma without judicial recourse, *i.e.*, either maintain the trigger lock on her shotgun and "forego possibl[e] lawful activity because of her well-founded fear of prosecution," *id.* at 998, or remove it and "willfully violate [section 7-2507.02 of the District of Columbia Code], thereby subjecting herself to criminal prosecution and punishment." *Id.* Accordingly, the Court finds that plaintiff Hailes' challenge to D.C. Code § 7-2507.02 is legally distinct from the plaintiffs' challenges to the District of Columbia statute that regulates the possession of pistols and therefore the Court must consider whether the provision offends the Second Amendment. The Court will now

proceed with that analysis.[13]

(2) What is the Scope of the Second Amendment?

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. One of the leading constitutional debates today centers around the scope of the Second Amendment and whether its purpose is to protect the sanctity of state militias or to provide a fundamental right to individuals, irrespective of their relationship to state militias, to possess firearms. At a time in our country's history when domestic security is a paramount

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[13]In concluding that plaintiff Hailes' Second Amendment challenge to D.C. Code § 7-2507.02 is legally distinct from the plaintiffs' challenges to the District of Columbia statute that regulates the possession of pistols, the Court finds that it must address the scope of the Second Amendment and whether it provides an individual right to possess firearms. While some courts have addressed Second Amendment claims on the merits, *see Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000), and others have resolved such challenges under the standing doctrine, *see Silveira v. Lockyer*, 312 F.3d 1052, 1066-67 n.17 (9th Cir. 2002), *cert. denied*, __ S. Ct. __, 2003 WL 21692140 (U.S. Dec. 1, 2003), this Court agrees with the *Silveira* Court that "as a practical matter, the choice of jurisprudential approach makes little or no difference." *Id.* This is because pursuant to either approach the Court must undertake a thorough analysis of the scope and purpose of the Second Amendment in order to determine whether a plaintiff is able to assert a constitutional challenge under this Amendment. In any event, because this Court concludes below that plaintiff Hailes is unable to assert a challenge to D.C. Code § 7-2507.02 pursuant to the Second Amendment because it does not provide an individual right to possess firearms, for procedural purposes the Court finds that Hailes' challenge to D.C. Code § 7-2507.02 must also be dismissed for lack of standing.

concern of our nation's citizenry, several events have brought the Second Amendment debate to the forefront, including: the lobbying efforts of the National Rifle Association ("NRA"),[14] the Department of Justice's ("DOJ") reversal of its long-standing position on the Second Amendment, which is now that the Second Amendment provides a fundamental individual right to possess weapons, *see Silveira v. Lockyer*, 312 F.3d 1052, 1064-65 (9th Cir. 2002), *cert. denied*, __ S. Ct. __, 2003 WL 21692140 (U.S. Dec. 1, 2003),[15] and the Fifth Circuit's recent decision in *United States v. Emerson*, 270 F.3d 203, where, for the first time ever, a United States Circuit Court of Appeals held that the Second Amendment guarantees a fundamental individual right to possess firearms. Against this backdrop, the plaintiffs in this case assert that as residents of the District of Columbia they have a fundamental individual right to possess firearms pursuant to the Second Amendment.

The debate regarding the scope of the Second Amendment encompasses three separate schools of thought. The first is what has been referred to as the "traditional individual rights" model, which posits "that the Second Amendment guarantees to individual private citizens a

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[14]Apparently the plaintiffs in this case have filed their lawsuit with the support of the NRA. *See* Motions and Memorandum of the Violence Policy Center for Leave to File a Brief as Amicus Curiae in Support of Defendants' Motions to Dismiss at 1 n. 1.

[15]In a brief filed with the Supreme Court, the Solicitor General advised the Court that "[t]he current position of the United States ... is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions ...." *Silveira*, 312 F.3d at 1065. Consistent with this position, the DOJ has informed this Court that this is still the position of the DOJ. *See* Att'y Gen.'s Mot. at 13 n. 11.

fundamental right to possess and use firearms for any purpose at all, subject only to limited government regulation." *Silveira*, 312 F.3d at 1060; *see Emerson*, 270 F.3d at 220 (stating that this "model is simply that the Second Amendment recognizes the right of individuals to keep and bear arms"). The second model is "a variant of the first," and has been referred to by the Ninth Circuit as the "limited individual rights" model, which opines that "individuals maintain a constitutional right to possess firearms insofar as such possession bears a reasonable relationship to militia service." *Silveira*, 312 F.3d at 1060. The Fifth Circuit referred to this second model as the "sophisticated collective rights" model, and explained that this model recognizes that an

> 'individual' right to *bear* arms can only be exercised by members of a functioning, organized state militia who bear the arms while and as a part of actively participating in the organized militia's activities. The 'individual' right to *keep* arms only applies to members of such a militia, and then only if the federal and state governments fail to provide the firearms necessary for such militia service. At present, virtually the only such organized and actively functioning militia is the National Guard, and this has been the case for many years. Currently, the federal government provides the necessary implements of warfare, including firearms, to the National Guard, and this likewise has long been the case. Thus, under this model, the Second Amendment poses no obstacle to the wholesale disarmament of the American people.

Emerson, 270 F.3d at 219. The third model, which is characterized as the "states' rights" or "collective rights" model,

> asserts that the Second Amendment right to 'bear arms' guarantees the right of the people to maintain effective state militias, but does not provide any type of individual right to own or possess weapons. Under this theory of the amendment, the federal and state governments have the full authority to enact prohibitions and restrictions on the use and possession of firearms, subject only to generally applicable constitutional constraints, such as due process, equal protection, and the like.

Silveira, 312 F.3d at 1060; *see Emerson*, 270 F.3d at 218.

(A) Early Judicial History of the Second Amendment

A review of early Second Amendment jurisprudence is an important starting point in the Court's analysis of whether District of Columbia residents have a fundamental right to possess firearms. The Supreme Court's only substantive discussion of the Second Amendment is found in the 1939 seminal case of *United States v. Miller*, 307 U.S. 174 (1939). In *Miller*, the defendants were indicted for "unlawfully, knowingly, wilfully, and feloniously transport [ing] in interstate commerce ... a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length ...." *Id.* at 175. The defendants asserted, in part, that the National Firearms Act violated the Second Amendment. The district court agreed and dismissed the

indictment. *Id.* at 176-77. On direct appeal from the district court's ruling, the Supreme Court authored what is perhaps the most widely quoted language on Second Amendment jurisprudence, albeit what has been characterized as "a somewhat cryptic discussion." *Silveira*, 312 F.3d at 1061. The *Miller* Court stated:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 21 Tenn. (2 Humph.) 154 (1840).
>
> The Constitution as originally adopted granted to the Congress power - -' To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by

> Congress.' With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

Id. at 178 (quoting U.S. Const. art. I, § 8). The *Miller* Court then went on to explain that

> [t]he Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia - - civilians primarily, soldiers on occasion.
>
> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Id. at 178-79. In a rather interesting review by the *Miller* Court of several state laws (Massachusetts, New York and Virginia) that were in existence just prior to the enactment of the Second Amendment, it appears that these states affirmatively required that its citizens be armed and members of those states' militias. *Id.* at 179-82. As the final reason for reversing the lower court's acceptance of the defendants' Second Amendment challenge to the statute under which they had been indicted, the Supreme Court noted that "[m]ost if not all of the States have adopted provisions touching the right to keep and bear arms." *Id.* at 820. The Court then observed that "none of [the states] seem to afford any material support for the challenged ruling of the court below." *Id.* "[S]ome of the more important opinions ..." on the subject that supported the Court's conclusion were then cited in *Miller*, including: the United States Supreme Court's opinions in *Presser v. Illinois*, 116 U.S. 252 (1886) and *Robertson v. Baldwin*, 165 U.S. 275 (1897), the Supreme Court of Kansas' opinion in *Salina v. Blaksley*, 83 P. 619 (Kan. 1905), the Supreme Court of Tennessee's opinion in *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 1840 WL 1554 (1840), the Supreme Court of Michigan's opinion in *People v. Brown*, 235 N.W. 245 (Mich. 1931), the Supreme Court of Texas' opinion in *State v. Duke*, 42 Tex. 455, 1875 WL 7460 (1874), and the Supreme Court of Appeals of West Virginia's opinion in *State v. Workman*, 14 S.E. 9 (W. Va. 1891).

While those courts that have analyzed the Supreme Court's decision in *Miller* have chosen not to focus much attention on the state court cases cited by the Court, presumably because most of them are state court cases construing state constitutional provisions, this Court finds it important to discuss their holdings because not only did the Supreme Court find them to be noteworthy enough to cite, but also because they

provide a historical perspective on the origin and scope of the Second Amendment.[16]

(i) The Other Supreme Court Cases Referenced in Miller

Before discussing the state court opinions cited in *Miller*, the Court will first examine the two earlier United States Supreme Court cases cited by the *Miller* Court: *Presser v. Illinois* and *Robertson v. Baldwin*. In *Presser*, the defendant was convicted of violating an Illinois statute that prohibited "any body of men [], other than the regular organized volunteer militia of [the] state, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of [the] state, without [a] license [from] the governor ...." 116 U.S. at 253 (citation omitted). The defendant challenged the Illinois statute on several different grounds, including a Second Amendment challenge. The Supreme Court, however, responded that

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[16]The Court notes that the Supreme Court's only reference to the scope of the Second Amendment following *Miller* was in *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980). In *Lewis*, the Supreme Court dismissed a Second Amendment challenge to a conviction under a statute that prohibited a convicted felon from possessing a firearm, stating in a footnote that "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Id.* (citing *Miller*, 307 U.S. 174). The *Lewis* Court characterized the holding in *Miller* as follows: "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Id.*

> the amendment is a limitation only upon the power of congress and the national government, and not upon that of the state. It was so held by this court in the case of *U[nited] S[tates] v. Cruikshank*, 92 U.S. 542, 553 (1875), in which the chief justice, in delivering the judgment of the court, said that the right of the people to keep and bear arms 'is not a right granted by the constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by congress. This is one of the amendments that has no other effect than to restrict the powers of the national government ....
>
> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

Id. at 265. Because the Supreme Court found that the Illinois

statute did not have the effect of depriving the United States of a "resource [necessary] for maintaining the public security ... [,]" *id.* at 265, the *Presser* Court found no Second Amendment violation. *Id.* at 265-66.

In *Robertson*, the Supreme Court stated in dicta that "[t]he law is perfectly well settled that the first 10 amendments to the constitution, commonly know as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors ...." 165 U.S. at 281. The *Robertson* Court further commented that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons [.]" *Id.* at 281-82.

Presser and *Robertson* provide guidance on the scope of the Second Amendment in several important respects. First, the Second Amendment is only a limitation on the national government and does not prohibit the states from restricting their own residents' access to firearms, so long as the states do not impair the national government's ability to provide for the national security. *See Presser*, 116 U.S. at 265. Second, that it is imperative to look at the historical origin of the Second Amendment to determine its scope. *See Robertson*, 165 U.S. at 281.

(ii) <u>The State Cases Referenced in Miller</u>

With the foregoing two principles in mind, the Court will now turn briefly to an examination of the several state court decisions cited by the *Miller* Court at the conclusion of its opinion. As the *Miller* Court noted, "[d]ifferences in the

language employed in [the state constitutional provisions construed by those courts] have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed." 307 U.S. at 182. However, what is important to this Court's analysis is not the varying extent of the right to possess firearms afforded by the different states, but what can be gleaned from these opinions about the scope of the right to "keep and bear arms" afforded by the United States Constitution in the Second Amendment as viewed by the Supreme Court in *Miller*.

In the Kansas Supreme Court's *Blaksley* case, the defendant was convicted of "carrying a revolving pistol within the city while under the influence of intoxicating liquor." 83 P. at 620. The defendant challenged the constitutionality of the local statute that permitted the regulation of firearms under section 4 of Kansas' Bill of Rights which stated: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." *Id.* The Kansas Supreme Court began its analysis by noting that the state constitutional right "refers to the people as a collective body. It was the safety and security of society that was being considered when this provision was put into our Constitution." *Id.* The *Blaksley* Court commented that

> [i]n some states where it has been held, under similar provisions, that the citizen has the right preserved by the Constitution to carry such arms as are ordinarily used in civilized warfare, it is placed on the ground that it was intended that the people would thereby become accustomed

> to handling and using such arms, so that in case of an emergency they would be more or less prepared for the duties of a soldier. The weakness of this argument lies in the fact that in nearly every state in the Union there are provisions for organizing and drilling state militia in sufficient numbers to meet any such emergency.

Id. And of particular significance to this case, the court stated

> [t]hat the provision in question applies only to the right to bear arms as a member of the state militia, or some other military organization provided for by law, is also apparent from the second amendment to the federal Constitution .... Here, also, the right of the people to keep and bear arms for their security is preserved, and the manner of bearing them for such purpose is clearly indicated to be as a member of a well-regulated militia, or some other military organization provided for by law.

Id. Thus, the *Blaksley* Court found that because the defendant was not a member of an organized militia, or any other lawful military organization, he was not protected against prosecution by section 4 of the Kansas Bill of Rights. *Id.* at 621.

The Supreme Court of Tennessee provided an instructive discussion on the phrase "bear arms" in *Aymette*, which the court concluded implies a military use of weapons. 1840 WL 1554, at *5. In *Aymette*, the defendant was convicted of carrying a concealed bowie-knife under his clothes and

challenged his conviction under the first article of the Tennessee state constitution, which in section twenty-six contained a declaration of rights which stated "that the free white men of [Tennessee] have a right to keep and bear arms for their common defen[s]e." *Id.* at *1. The *Aymette* Court began its discussion by examining the history underlying the meaning of the clause of the Tennessee state constitution that was under consideration. *Id.* at *2. The court noted that English law originally permitted only individuals of "a certain condition in life," *i.e.*, wealthy individuals, to possess arms "while a large proportion of the people were entirely disarmed." *Id.* However, King James II, "by his own arbitrary power, and contrary to law, disarmed the Protestant population, and quartered his Catholic soldiers among the people. This, together with other abuses, produced the revolution ... [and] William and Mary succeeded him ...." *Id.* With new leadership assuming the throne, "Parliament ... declared the existence of certain rights which they insisted upon as their undoubted privileges." *Id.* In the declaration of rights, Protestants were given the right to possess arms, but this privilege once again only extended to the wealthy. *Id.* The Aymette Court commented that

> [t]he evil that was produced by disarming the people in the time of James II was that the king, by means of a standing army quartered among the people, was able to overawe them, and compel them to submit to the most arbitrary, cruel, and illegal measures. Whereas, if the people had retained their arms, they would have been able, by a just and proper resistance to those oppressive measures, either to have caused the king to respect their rights, or

> surrender (as he was eventually compelled to do) the government into other hands. No private defen[s]e was contemplated, or would have availed anything.... When, therefore, Parliament says that 'subjects which are Protestants may have arms for their defen[s]e, suitable to their condition, as allowed by law,' it does not mean for private defen[s]e, but, being armed, they may as a body rise up to defend their just rights, and compel their rulers to respect the laws.

Id. Therefore, the *Aymette* Court concluded:

> As the object for which the right to keep and bear arms is secured is of general and public nature, to be exercised by the people in a body, for their common defen[s]e, so the arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defen[s]e of the citizens. The right to keep and bear them is not therefore, secured by the constitution.

Id. at *3.

In *Brown*, the defendant was convicted of carrying a blackjack, which was deemed to be a dangerous weapon. 235 N.W. at 245. The defendant challenged his conviction under section 5 of article 2 of Michigan's Constitution, which provides that "Every person has a right to bear arms for the defense of himself and the state." *Id.* at 246. The *Brown* Court commented that

> [i]t is generally recognized that the constitutional declaration, in both Federal and State Constitutions, of the right to bear arms, had its origin in the fear of the American colonists of a standing army and its use to oppress the people, and in their attachment to a militia composed of all able-bodied men. Probably the necessity of self-protection in a frontier society also was a factor.

Id. Acknowledging that there was some disagreement among the states regarding the scope of the Second Amendment's protections, the *Brown* Court stated that "[t]he authorities cannot be reconciled except in respect of the proposition that, regardless of the basis of the right to bear arms, the state, nevertheless, has the police power to reasonably regulate it." *Id.* (citations omitted). The *Brown* Court went on to comment:

> When the bulwark of state defense was the militia, privately armed, there may have been good reason for the historical and military test of the right to bear arms. But in this state the militia, although legally existent and composed

> of all able-bodied male citizens of Michigan and those of foreign birth who have declared their intention to become citizens, is practically extinct and has been superceded by the National Guard and reserve organizations. If called to service, the arms are furnished by the state. In times of peace, the militia, as such, is unarmed and the historical test would render the constitutional provision lifeless.

Id. (internal citations omitted).

In *Duke*, the defendant challenged the constitutionality of a Texas statute that made it unlawful to carry a pistol. 1875 WL 7460, at *1. The *Duke* Court commented that the Second Amendment and the other amendments of the Bill of Rights "were intended to be limitations on the power of the government of the thirteen States, and not on the powers of the State governments." *Id.* at *2 (citing *Barron v. City of Baltimore*, 32 U.S. 243 (1833)). The court considered whether the Texas statute violated the 13th section of the Bill of Rights in the Texas Constitution, which stated that "[e]very person shall have the right to keep and bear arms in the lawful defense of himself or the State, under such regulations as the Legislature may prescribe." *Id.* Noting that there was "no recital of the necessity of a well-regulated militia, as there is in the corresponding clause in the Constitution of the United States[,]" the court found the statute valid because "the Act in question is nothing more than a legitimate and highly proper regulation of [the] use [of pistols]." *Id.* at *3.

Finally, in *Workman*, the defendant was convicted under state law of carrying a concealed weapon and the Supreme

Court of Appeals of West Virginia was asked to consider whether the state statute violated the Second Amendment. 14 S.E. at 10-11. In discussing the origins of the Second Amendment, the *Workman* Court commented:

> As early as the second year of Edward III., a statute was passed prohibiting all persons, whatever their condition, 'to go or ride armed by night or day.' And so also at common law the 'going around with unusual and dangerous weapons to the terror of the people' was a criminal offense. The keeping and bearing of arms, therefore, which at the date of the amendment was intended to be protected as a popular right, was not such as the common law condemned, but was such a keeping and bearing as the public liberty and its preservation commended as lawful, and worthy of protection. So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets, - - arms to be used in defending the state and civil liberty, - - and not to pistols ... and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, desperados, to the terror of the community and the injury of the state.

Id. at 11 (internal citations omitted).

These state court opinions provide several significant

insights about the scope of the Second Amendment. First, and of prime importance to this case, the Second Amendment is not a grant of an individual right to bear arms, but a right solely designed to protect the vitality of the state militias. This is perhaps best captured by the *Blaksley* Court's comments that "the right of the people to keep and bear arms for their security is preserved, and the manner of bearing them for such purpose is clearly indicated to be as a member of a well-regulated [state] militia ...[,]" 83 P. at 620, and the *Aymette* Court's discussion of the historical origin of the Second Amendment and that the right derived from the amendment "does not mean for private defen[s]e, but, being armed, [the people] may as a body rise up to defend their just rights, and compel their rulers to respect the laws." 1840 WL 1554, at *2. And, as the *Brown* Court stated, this collective body that was established to protect "the people" from their fears of "a standing army and its use to oppress the people" was the state militia. 235 N.W. at 246. Second, this Court finds it very telling that the *Blaksley* Court directly addressed the assertion by some that the Second Amendment was an individual right designed and "intended [so] that the people would thereby become accustomed to handling and using such arms [as are ordinarily used in warfare]." 83 P at 620. The court concluded that "[t]he weakness of this argument lies in the fact that in nearly ever state in the Union there are provisions for organizing and drilling state militia in sufficient numbers to meet any such emergency." *Id.* And such is the case in the District of Columbia. See D.C. Code § 49-401 (2001). While these cases do not conclusively resolve the debate over the scope of the Second Amendment, they are significant not only because the *Miller* Court found them noteworthy and none of them recognized an individual right to bear arms, but also because they provide important historical background

concerning the origin of the Second Amendment.

(B) Modern Second Amendment Jurisprudence

For more than sixty years following the Supreme Court's decision in *Miller*, there was little judicial debate regarding the scope of the Second Amendment, as almost every circuit court interpreted *Miller* as rejecting the notion that the Second Amendment provided individuals a constitutional right to possess firearms. *See Thomas v. Members of City Council*, 730 F.2d 41, 42 (1st Cir. 1984) ("Established case law makes clear that the federal Constitution grants appellants no right to carry a concealed handgun."); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir.), *cert. denied*, 516 U.S. 813 (1995) ("The Second Amendment does not apply to the states. Moreover, even as against federal regulation, the amendment does not confer an absolute individual right to bear any type of firearm."); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000) ("Whatever questions remain unanswered, *Miller* and its progeny do confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia."); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996) ("[I]t is clear that the Second Amendment guarantees a collective rather than an individual right. Because the Second Amendment guarantees the right of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is

infringed."); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) ("The purpose of the second amendment as stated by the Supreme Court in *United States v. Miller*, [] was to preserve the effectiveness and assure the continuation of the state militia. The Court stated that the amendment must be interpreted and applied with that purpose in view. To apply the amendment so as to guarantee appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of logic or policy."); *United States v. Wright*, 117 F.3d 1265, 1271-74 (11th Cir.), *cert. denied*, 522 U.S. 1007 (1997) ("Because [the plaintiff] has presented no evidence to demonstrate any connection, let alone a 'reasonable relationship,' between his possession of the machineguns and pipe bombs and the preservation or efficiency of militia actively trained and maintained by the State of Georgia, his weapons possession is entitled to no constitutional protection.").[17] Then,

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[17]In *Silveira*, the Ninth Circuit stated "[i]t appears that only the Second and District of Columbia Circuits have not taken a position, considered or otherwise, on the nature of the right established by the Second Amendment." 312 F.3d at 1063 n.11. However, this Court notes that in *United States v. Toner*, 728 F.2d 115 (2d Cir. 1984), the Second Circuit commented that the defendant's concession that a federal statute that "makes it a felony for an illegal alien to receive, possess, or transport 'in commerce or affecting commerce ... any firearm' ... passes constitutional muster if it rests on a rational basis, [was] clearly correct since the right to possess a gun is clearly not a fundamental right ...." *Id.* at 128 (citing *Miller*, 307 U.S. 174 (cited for the proposition that "in the absence of evidence showing that firearm has 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' Second Amendment does not guarantee right to keep and bear such a weapon")). While the Second Circuit may not have taken a definitive position on the Second Amendment, it clearly concluded that the Second Amendment does not provide a fundamental individual right to possess a weapon.

in 2001, a divided panel[18] of the Fifth Circuit altered the judicial

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The District of Columbia Circuit, however, up to this point has chosen not to address the scope of the Second Amendment. In *Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998), the Circuit Court stated that "[d]espite the intriguing questions raised, we will not attempt to resolve the status of the Second Amendment right ...." *Id.* at 1002. Most recently, in *United States v. Maple*, 334 F.3d 15, 21 (D.C. Cir.), *vacated in part* by __ F.3d __, 2003 WL 22532808, at *1 (D.C. Cir. 2003) (vacating only part II of the opinion dealing with the constitutionality of a warrantless search of the defendant's car and reversing defendant's conviction and remanding the case for a retrial), a defendant attempted to challenge the constitutionality of section 22-4504(a) of the District of Columbia Code, which states: "No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed." D.C. Code § 22-4504(a) (2001). The defendant in *Maple* asserted that although he failed to raise this challenge before the district court, it was "plain error" for the trial court not to consider the constitutionality of this statute in light of the Fifth Circuit's holding in *Emerson*. *Maple*, 334 F.3d at 21. The Circuit Court, however, concluded that "[a]lthough there are cases in which it is appropriate to hear a constitutional claim not raised at trial, clearly this is not one of them. Convictions for unlicensed gun possession have been upheld for several years in the District of Columbia." *Id.* (internal citations omitted).

[18]In a concurrence, Judge Parker stated that he chose

> not to join Section V, which concludes that the right to keep and bear arms under the Second Amendment is an individual right, because it is dicta and is therefore not binding on us or on any other court.... The fact that the 84 pages of dicta contained in Section V are interesting, scholarly, and well written does not change the fact that they are dicta and amount to at best an advisory treatise on this long-running debate.... No doubt the special interests and academics on both sides of this debate will take great interest in the fact that at long last some court has determined (albeit in dicta) that the Second Amendment bestows an individual right.

landscape of Second Amendment jurisprudence in *United States v. Emerson*, stating that

> consistent with *Miller*, that [the Second Amendment] protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms ... that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*.

Id. at 260. The *Emerson* Court focused much of its discussion of *Miller* on the brief that the government had filed before the Supreme Court in *Miller*, finding that the government advanced two separate arguments on appeal. First, the government in *Miller* asserted that the "right secured by the Second Amendment is 'only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.'" *Id.* at 220 (citing Government's Brief at 15). In its second argument, the government asserted that "the terms 'arms' as used in constitutional provisions refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals." *Id.* After citing several state court cases and *Robertson*, the government's brief in *Miller* stated:

> That the foregoing cases conclusively establish that the Second Amendment has relation only to

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Emerson, 270 F.3d at 272-74 (Parker, J., concurring).

> the right of the people to keep and bear arms for lawful purposes and does not conceivably relate to weapons of the type referred to in the National Firearms Act cannot be doubted. Sawed-off shotguns, sawed-off rifles and machine guns are clearly weapons which can have no legitimate use in the hands of private individuals.

Id. at 223. The *Emerson* Court concluded that the Supreme Court in Miller based its ruling on the government's second argument and not its first argument because nowhere in the opinion is there a discussion regarding whether the defendants had a connection to a militia. The *Emerson* Court reasoned that "[h]ad the lack of such membership or engagement been a ground of the decision in *Miller*, the Court's opinion would obviously have made mention of it. But it did not." *Id.* at 224. Thus, two judges of the Fifth Circuit have embraced what has been deemed by the Ninth Circuit to be "a weapons-based theory of the amendment that permits individuals to possess firearms for personal use, regardless of the relationship of the individual or the weapon to militia service, as long as those weapons have a 'legitimate use in the hands of private individuals.'" *Silveira*, 312 F.3d at 1063 n.11 (citing *Emerson*, 270 F.3d at 223).

Following *Emerson*'s ground-breaking conclusion, the Ninth Circuit in *Silveira* found that the appellants in that case lacked standing to challenge the California Assault Weapons Control Act, Cal. Penal Code § 12275 *et seq.*, on Second Amendment grounds, concluding that

when we give the text [of the Second Amendment] its most plausible reading and consider the amendment in light of the

historical context and circumstances surrounding its enactment we are compelled to reaffirm the collective rights view we adopted in *Hickman*: The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use.

Id. at 1066 (citing *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996)). Thus, in reaffirming the position taken by all of the circuit courts that have considered the question and rejected the notion that the Second Amendment provides individuals with a constitutional right to possess firearms, with the exception now of the Fifth Circuit, one would think that this debate, which has resulted in a circuit-split, is a prime subject for review by the Supreme Court.

(C) A Historical Review of the Second Amendment's Prefatory Clause: "A Well Regulated Militia Being Necessary to the Security of a Free State"

An accurate understanding of the origins of the term "militia," as used in the Second Amendment, is critical to an understanding of the proper scope of the Amendment's language which speaks about "the right of the people to keep and bear arms ...." U.S. Const. amend. II. This Court, like the *Silveira* Court, finds the traditional individual rights position that was embraced by the *Emerson* Court to be fatally flawed in that it misconceives the meaning of the term "militia." In assessing what constitutes the militia within the context of the Amendment, the *Emerson* Court found insightful the Supreme Court's observation in *Miller* that "'the Militia comprised all

males physically capable of acting in concert for the common defense' and 'that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves.'" *Emerson*, 270 F.3d at 234 (quoting *Miller*, 307 U.S. at 179). The *Emerson* Court further noted that *Miller* states that "'[i]n all the colonies ... the militia systems ... implied the general obligation of all adult male inhabitants to possess arms.'" *Id.* (quoting Miller, 307 U.S. at 179). The court then pointed out that "[t]here are frequent contemporaneous references to 'a well-regulated militia' being 'composed of the body of the people, trained in arms.'" *Id.* From these passages, the *Emerson* Court concluded that "'a well-regulated militia' refers not to a special or select subset or group taken out of the militia as a whole ...." *Id.* (footnote omitted). Based on this assessment, the *Emerson* Court, like the traditional individual rights advocates, reasoned that because the term "militia" refers to individuals, the Second Amendment guarantees individuals, including those who are not part of the militia or other military service, a fundamental right to possess firearms subject to reasonable regulation by the government. *Id.* at 260.

The Court is unable to agree with this position because, like the Ninth Circuit in *Silveira*, 312 F.3d at 1069-70, it finds that the term "militia," as used in the Second Amendment, is clearly referencing a state military body. Perhaps the best evidence of this lies in Article I of the Constitution, which discusses the powers of Congress. As the *Miller* Court explained, under Article I,

> [t]he Constitution as originally adopted granted to the Congress power - - 'To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel

> Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, *reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.*'

307 U.S. at 178 (emphasis added) (quoting U.S. Const. art. I, § 8, cl. 15-16 ("Militia Clauses")). It is apparent from Article I that the Constitution establishes dual control over the militias, as they were intended to be "essentially organized and under control of the states, but subject to regulation by Congress and to 'federalization' at the command of the President." *Silveira*, 312 F.3d at 1070 (citation omitted). This Court's conclusion that the term "militia" refers to a state military entity is further supported by "the drafters of the Constitution's predecessor document, the Articles of Confederation." *Id.* at 1071. The Articles of Confederation "provided that 'every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.'" *Id.* (quoting *The Articles of Confederation* art. 6 (1777), *in Documents of American History* 112 (Henry Steele Commager ed., 7th ed. 1963)). Thus, the Articles provide further evidence that a "militia" was understood to be a state military entity. Moreover, and of particular significance to the Court's opinion about the meaning of the term "militia" is the Ninth Circuit's discussion in Silveira about the reasons underlying the inclusion of the phrase "necessary to

the security of a free State" in the Second Amendment.

> This choice of language was far from accidental: [James] Madison's first draft of the amendment stated that a well-regulated militia was 'the best security of a free country.' Anti-Federalist Elbridge Gerry explained that changing the language to 'necessary to the security of a free State' emphasized the primacy of the state militia over the federal standing army: 'A well-regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one.'"

Id. (citing David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 Mich. L. Rev. 588, 610 (2000) (quoting The Congressional Register, August 17, 1789)). As this Court will more fully explore below in subsection E, infra at 49-54, it is apparent that the phrase "a well regulated militia" in the Second Amendment refers to the maintenance of an effective state fighting force, which was specifically included by the drafters of the Bill of Rights to protect the states against a potentially oppressive federal government. It was only through strong state militias that the drafters believed the people of our nation could be secure in the blessings of liberty and no longer fear a tyrannical federal government which had a standing army at its disposal.

(D) <u>A Historical Review of the Second Amendment's Clause: "The Right of the People to Keep and Bear Arms, Shall Not Be Infringed."</u>

As support for their position that the Second Amendment grants individuals a fundamental right to possess firearms, proponents of the traditional individual rights approach tend to focus on the Second Amendment's latter clause, which states: "the right of the people to keep and bear arms, shall not be infringed." This Court concludes that advocates of the traditional individual rights approach mistakenly rely on this clause as support for their position because, like the Ninth Circuit, the Court finds it "highly significant ... that the second clause does not purport to protect the right to 'possess' or 'own' arms, but rather to 'keep and bear' arms. This choice of words is important because the phrase 'bear arms' is a phrase that customarily relates to a military function." *Id.* at 1072.

Both the *Emerson* and *Silveira* Courts recognized that the most significant judicial decision in defining the term "bear arms" is the Tennessee Supreme Court's decision in *Aymette*, which as this Court indicated above was cited by the *Miller* Court. *See Silveira*, 312 F.3d at 1073 ("The Tennessee Supreme Court, in the most significant judicial decision to construe the term 'bear arms' ...."); *Emerson*, 270 F.3d at 229-30 ("The best evidence that 'bear arms' was primarily used to refer to military situations comes from *Aymette* ...."). As already explained above, in considering the defendant's constitutional challenge to the Tennessee statute prohibiting the wearing of a concealed bowie-knife, the *Aymette* Court stated that the Tennessee constitutional provision that protected "the free white men of [the] State [to] have a right to keep and bear arms for their common defen[s]e" was adopted for the same reason the Second Amendment was adopted: to permit the people not "for [their] private defen[s]e, but, being armed, they may *as a body* rise up to defend their just rights, and compel their rulers to respect the laws." 1840 WL 1554, at *2 (emphasis added). The

Aymette Court explained that

> [t]he words 'bear arms,' too, have reference to their military use .... As the object for which the right to keep and bear arms is secured is of general and public nature, to be exercise by the people in a body ... so the arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war.

Id. at *3. The *Aymette* Court concluded its discussion of the term "bear arms" by stating:

> To make this view of the case still more clear, we may remark that the phrase, 'bear arms,' is used in the Kentucky constitution as well as in our own, and implies, as has already been suggested, their military use.... A man in the pursuit of deer, elk, and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms; much less could it be said that a private

> citizen bears arms because he has a dirk or pistol concealed under his clothes, or a spear in a cane.

Id. at *5.

The *Silveira* Court also noted that the first version of the Second Amendment proposed by James Madison "concluded with an exemption from 'bearing arms' for the 'religiously scrupulous.'" 312 F.3d at 1073 (citing *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 169 (Neil H. Cogan ed., 1997)).[19] The original version proposed by Madison read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." *The Complete Bill of Rights* at 169 (quoting *Congressional Register*, June 8, 1789, vol. 1, p. 427). The Ninth Circuit noted that "[h]istorians have observed that '[n]o state at the time, nor any state before, had ever compelled people to carry weapons in their private capacity.'" *Silveira*, 312 F.3d at 1073-74 (quoting Paul Finkelman, "*A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 Chi.-Kent L. Rev. 195, 228 (2000)). Thus, although the religious exemption provision was not incorporated into the final version of the Amendment, Madison's attempt to include it, reflects the thoughts of the primary drafter of the Second Amendment. On this point, the Ninth Circuit concluded that

> the exemption from bearing arms for the

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[19]This has been referred to in modern day parlance as a conscientious objector provision. *Silveira*, 312 F.3d at 1085.

> religiously scrupulous can only be understood as an exemption from carrying arms in the service of a state militia, and not from possessing arms in a private capacity. Otherwise, Madison's insertion of the religiously-scrupulous exception in the first draft of the present amendment would have made no sense at all.

Id. at 1074.

Acknowledging that "[t]here is no question that the phrase 'bear arms' may be used to refer to the carrying of arms by a solider or militiaman[,]" the *Emerson* Court proceeded instead to recast the issue as whether this term "was also commonly used to refer to the carrying of arms by a civilian." 270 F.3d at 229-32. This Court, however, is unable to agree with this proposition. The *Aymette* Court was clear that the "phrase ... 'bear arms' ... implies ... [a] military use" and an individual that carries or possesses a weapon for a private, *i.e.*, non-military, purpose does not "bear arms." 1840 WL 1554, at *5. Accordingly, this Court must conclude that the term "bear arms" only has a military connotation.

While it is this Court's view that the inclusion of the term "bear arms" in the clause - "the right of the people to keep and bear arms" - clearly refers to the carrying of arms in the military context, the inclusion of the term "keep" has perplexed historians. *Silveira*, 312 F.3d at 1074 ("The reason why the term was included in the amendment is not clear."); *Emerson*, 270 F.3d at 232 (noting that the government and amici did not argue that the term "keep" has a military connotation, but providing no substantive discussion on this issue). Although there is little historical discussion on the inclusion of the word

"keep" in the Second Amendment, this Court finds it noteworthy that some historians "have suggested that 'keep and bear' must be construed together (like 'necessary and proper') as a unitary phrase that relates to the maintenance of arms for military service." *Silveira*, 312 F.3d at 1074 (citing Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 Chi.-Kent L. Rev. 291, 317 (2000)). Moreover, others

> have noted that the right of the states to 'keep' arms was a catalyst for the Revolution - - it was the British troops' attempts to capture the Massachusetts militia's arsenal that prompted Paul Revere's warning and the battles at Lexington and Concord to defend the state's stores of munitions. Accordingly, the ability of states to 'keep' arms for military use without external interference undoubtedly was prominent in the minds of many founders.

Id. (citing Finkelman, *supra*, at 234). Thus, while the individual rights advocates focus on the latter clause of the Second Amendment as support for their position, the Court finds that this clause does not provide support for the position that the Second Amendment somehow provides for an individual right to possess firearms.

(E) The Historical Context of the Second Amendment's Enactment

A review of the historical context underlying the enactment of the Second Amendment supports the view that it was included in the Bill of Rights to ensure that the states would

have an effective military force, not only to provide support for the federal government in times of certain specified national emergencies, *see* U.S. Const. art. I, § 8, cl. 15, but also to ensure that the people would have the ability to defend themselves against a potentially oppressive federal government. The Constitution and Bill of Rights were enacted following a bitter war with Great Britain, at a time when the American people had grave concerns about the existence of standing armies. *Silveira*, 312 F.3d at 1076-77 (citing Dorf, *supra*, at 308). Citing Adam Smith's Wealth of Nations, the Supreme Court commented in *Miller*, in discussing the need for a militia, that "[m]en of republican principles have been jealous of a standing army as dangerous to liberty." 307 U.S. at 179. In fact, "one of the principal complaints listed in the Declaration of Independence was that King George III 'has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil power.'" *Silveira*, 312 F.3d at 1076-77 (quoting *The Declaration of Independence* ¶ 2 (U.S. 1776)). After noting the dual control of the militia in the Constitution's Militia Clauses, the Supreme Court in *Miller* commented that "[t]he sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia - - civilians primarily, soldiers on occasion." 307 U.S. at 179.

In the Articles of Confederation, which were in effect from 1781-1789, "[t]he bulwark of the national defense was the state militias, which bodies the states could voluntarily contribute to the services of the Confederation. The states retained the sole power to arm and otherwise to maintain their respective militias." *Silveira*, 312 F.3d at 1077 (citing *The Articles of Confederation, supra*, art. 6 ("[E]very state shall

always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.")). It is interesting that during the time when the Articles of Confederation were in existence, some of the states assumed the responsibility for arming their own militias, while other states required that individual militiamen bring their own arms for militia service. *Id.* at 1077 n.36. However, many of our founding fathers saw that the governmental system under the Articles of Confederation as flawed in many respects, including its omission of a national military force. *Id.* at 1078. In fact, in a letter to John Adams, George Washington wrote that "in the wake of Shays's Rebellion [and] the lack of a unified military force, '[w]e are fast verging to anarchy and confusion!'" *Id.* at 1078 n.37 (quoting Letter from George Washington to James Madison (Nov. 5, 1786), *in* 29 *The Writings of George Washington*, 1745-1799, at 51 (John Clement Fitzpatrick ed., 1931)). A movement ultimately emerged for "[t]he establishment of a national armed force[, which] was one of the primary reasons that the Constitutional Convention in 1787 was convened." *Id.* at 1078. A review of "[t]he minutes of the proceedings of the Constitutional Convention reveal that the delegates to the convention devoted substantial efforts to determining the proper balance between state and federal control of military matters." *Id.* (citing Yassky, *supra*, at 599). As the Supreme Court explained in *Perpich v. Department of Defense*, 496 U.S. 334 (1990),

> [t]wo conflicting themes, developed at the Constitutional Convention and repeated in

> debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means for providing for the common defense. Thus, Congress was authorized both to raise and support a national Army and also to organize 'the Militia.'"

Id. at 340. The Ninth Circuit noted that

> [t]he provision that most troubled the Anti-Federalists, and that prompted the most strident calls for amendment to the proposed constitution, was the one that authorized Congress to provide arms to the militias. The disagreement among the delegates arose not over whether Congress should be able to arm the militias at all, but over whether that power should be exclusive or concurrent with a state power to provide such arms - - as well as over how other responsibilities for the militias should be distributed between the state and federal governments.

Silveira, 312 F.3d at 1079 (citing *Perpich*, 496 U.S. at 340). Following the conclusion of the Constitutional Convention and

the ratification of the Constitution, the First Congress met in New York in April of 1789. *Id.* at 1084. In direct response to efforts by the Anti-Federalists to change the new Constitution, James Madison introduced "twelve proposed amendments soon after the new legislature convened." *Id.* (citation omitted). Among the many proposals by the Anti-Federalists to stymy the powers of the new national government, were calls for "limit[ations] on the national army, as well as on the authority of the federal government to call the state militia into federal service." *Id.* at 1084 n.50. The Anti-Federalists feared that "federal power [could be used] to call forth state militias ... lead[ing] to one state's militia being turned against another's, and that the federal government would force state militias to march to far-flung corners of the nation." *Id.* (citing Yassky, *supra*, at 607). The *Silveira* Court found that

> [t]he debates of the First Congress regarding Madison's proposed Second Amendment, like the debates at the Constitution's ratifying conventions, support the view that the amendment was designed to ensure that the people retained the right to maintain effective state militias, the members of which could be armed by the states as well as by the federal government. Otherwise, the anti-Federalists feared, the federal government could, by inaction, disarm the state militias (and thus deprive the people of the right to bear arms).

Id. at 1085. The Ninth Circuit went on to note that

> [n]o one in the First Congress was concerned,

> however, that federal marshals might go house-to-house taking away muskets and swords from the man on the street or on the farm. Notably, *there is not a single statement in the congressional debate about the proposed amendment that indicates that any congressman contemplated that it would establish an individual right to possess a weapon.*

Id. (citing Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 210-11 (2000)).[20] Instead, as discussed above, *see infra*, at 47, the debates in the First Congress on the Second Amendment focused on a conscientious objector provision contained in the first version of the Amendment proposed by James Madison, which "concluded with an exemption from 'bearing arms' for the 'religiously scrupulous.'" 312 F.3d at 1073, 1085 (citations omitted). The Ninth Circuit observed:

> The fact that the overwhelming majority of the debate regarding the proposed Second Amendment related to the conscientious

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[20]In fact, the *Silveira* Court noted that

> in other public fora, some of the framers explicitly disparaged the idea of creating an individual right to personal arms. For instance, in a highly influential treatise, John Adams ridiculed the concept of such a right, asserting that the general availability of arms would 'demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man - - it is a dissolution of the government.'

312 F.3d at 1085 (quoting 3 John Adams, A Defence of the Constitutions of Government of the United States 475 (1787)).

> objector provision demonstrates that the congressmen who adopted the amendment understood that it was concerned with the subject of state militias. A right not to bear arms due to conscientious objection can *only* mean a right not to be compelled to carry arms that the government seeks to make one bear - - to perform military service that one is unwilling to perform. There is no possible relevance of the term 'conscientious objection' to a constitutional amendment guaranteeing a private right to possess firearms. Thus, if the Second Amendment was in fact designed to establish an individual right, the debate over the conscientious objector provision would have been entirely purposeless.

Id. at 1085-86. Finally, the Court finds it significant that in his efforts to convince the people of the advantages of the Constitution in The Federalist Papers, James Madison noted that although the federal government had a standing army, the people would have the use of militias, stating:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger .... Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate

> governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

Id. at 1079-80 (quoting *The Federalist* No. 46, at 267 (Clinton Rossiter ed., 1961)).

For the aforementioned reasons, this Court finds that the Second Amendment was adopted to ensure the effectiveness of state militias as protectors of the states, and thus the people, from the potential of an oppressive national government. Accordingly, the Court must conclude that the Second Amendment does not confer an individual a right to possess firearms. Rather, the Amendment's objective is to ensure the vitality of state militias. Having concluded that the traditional individual rights model does not withstand a contextual and historical analysis of the Second Amendment, this Court needs not determine whether the Amendment protects the rights of individual state militia members to possess firearms to resolve the issues raised in this case. This determination does not have to be made because, as the Court will explain below, the Second Amendment's scope does not extend to the District of Columbia, but, even if it did, plaintiff Hailes has failed to assert that she is part of the District of Columbia's militia and therefore has a right to possess firearms as a result of such membership.

(F) Does the Second Amendment Apply to the District of Columbia and, if it Does, Does It Apply to the Plaintiff in this Case?

This Court finds that the circumstances of this case are

distinct from all of the cases that have addressed the Second Amendment in one significant respect. All of those cases involved challenges by state citizens, whereas here, the challenges are being made by District of Columbia residents. The District of Columbia, which does not occupy state status, is a uniquely designed governmental entity, whose powers are vested in Congress, which in turn has delegated some of its authority over District of Columbia affairs to the congressionally created local government system. *See* D.C. Code §§ 1-201 *et seq.* This dual control over the affairs of the District of Columbia is particularly unique in the context of the current Second Amendment debate. On one hand, the District of Columbia has a general prohibition against the possession of pistols by residents of the District, *see* D.C. Code § 7-2502, and the United States Attorney's Office for the District of Columbia, which is charged with prosecuting violations of this statute along with the Corporation Counsel's Office of the District of Columbia, strictly enforces this firearms proscription. On the other hand, the United States Department of Justice, which has ultimate authority over the United States Attorney's Office, has now taken the position that the Second Amendment protects an individual's fundamental right to possess firearms. *See* Att'y Gen.'s Mot. at 13 n.11. This conflict between existing District of Columbia law and the Department of Justice's current position, along with the Fifth Circuit's decision in *Emerson*, has led to a number of challenges to the District's legislation prohibiting the possession of firearms by defendants being prosecuted in the Superior Court of the District of Columbia. *See, e.g.*, *United States v. Freeman*, Cr. No. F-1048- 02 (D.C. Super. Ct. 2002) (Keary, J.) (denying defendant's motion to dismiss the indictment charging him with carrying a pistol without a license, possession of an unregistered firearm, and

possession of ammunition, as violations of his rights under the Second, Fifth and Fourteenth Amendments and finding that the Second Amendment protects "only a collective, rather than an individual right, to bear arms).

(i) Does the Second Amendment Apply to the District of Columbia?

In *District of Columbia v. Carter*, 409 U.S. 418 (1973), the Supreme Court commented that

> [t]he District of Columbia ... 'is an exceptional community ... established under the Constitution as the seat of the National Government.' *District of Columbia v. Murphy*, 314 U.S. 441, 452 (1941). As such, it 'is as lasting as the states from which it was carved or the union whose permanent capital it became.' *O'Donoghue v. United States*, 289 U.S. 516, 538 (1933). Indeed, it is 'the very heart - - of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised ....' *Id.* at 539. Unlike either the States or Territories, the District is truly sui generis in our governmental structure.

Id. at 432. The Constitution provides for the creation of the District of Columbia in Article I, which grants Congress the power

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (no exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places, purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock Yards, and other needful Buildings.

U.S. Const. Art. I, § 8, cl. 17. Thus, the *Carter* Court commented that

> while Congress was unable to exert any direct control over the actions of state officials, it was authorized under Art. I, § 8, cl. 17, of the Constitution to exercise plenary power over the District of Columbia and its officers. Indeed, '(t)he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs.'

409 U.S. at 429 (quoting *Berman v. Parker*, 348 U.S. 26, 31 (1954)). However, "[i]n 1973, Congress delegated the bulk of this authority to the District by passing the Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1-201 *et seq.*)." *Bliley v. Kelly*, 23 F.3d 507, 508 (D.C. Cir. 1994). The Home Rule Act places certain limitations and reservations on this delegation of authority, which are chiefly contained in sections 1-206.01 and 1-206.02

of the District of Columbia Code. First, Congress has reserved to itself the authority to enact "legislation for the District on any subject ... including legislation to amend or repeal any law in force in the District ... and any act passed by the [District of Columbia] Council." D.C. Code § 1-206.01. Second, Congress has also reserved the authority to veto any legislation enacted by the District of Columbia Council, legislating in section 1-206.02(c)(1) that:

> the Chairman of the Council shall transmit to the Speaker of the House of Representatives, and the President of the Senate, a copy of each act passed by the Council and signed by the Mayor .... [S]uch act shall take effect upon the expiration of the 30-calendar- day period (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate, or upon the date prescribed by such act, whichever is later, unless during such 30-day period, there has been enacted into law a joint resolution disapproving such act.

D.C. Code § 1-206.02(c)(1). The *Bliley* Court aptly summarized the legislative process under the Home Rule Act, stating that it provides "Congress a layover period of thirty statutory days to review legislation submitted by the D.C. Council. If Congress fails to pass a joint resolution of

disapproval within that period, the legislation becomes law."[21] 23 F.3d at 508. Thus, while Congress delegated a substantial portion of its legislative authority to the District of Columbia Council, it always maintains final control over all legislation adopted for the District of Columbia. One final point that bears mentioning is that section 1-206.02 contains a provision which states that "[n]othing in this chapter shall be construed as vesting in the District government any greater authority over ... the National Guard of the District of Columbia ... or ... over any federal agency, than was vested in the Commissioner prior to January 2, 1975." D.C. Code § 1-206.02(b).

With this background in mind, the Court will examine whether the Second Amendment is applicable to the District of Columbia, because it is patently clear that only certain statutory and constitutional provisions apply to the District of Columbia. Thus, for example, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court held that the Fourteenth Amendment does

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[21] And this is what happened regarding the District of Columbia statutes that are being challenged by the plaintiffs here. As explained by the District of Columbia Court of Appeals in *McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978),

> [o]n June 26, 1976, the District of Columbia Council [] enacted the Firearms Control Regulations Act of 1975 (the Act or the Firearms Act). The legislation was signed by the Mayor on July 23, 1976, and was sent to Congress for a 30-day review in accordance with ... [the Home Rule Act]. Resolutions to disapprove the Firearms Act were introduced in the House of Representatives, but were unsuccessful; consequently, the Act became effective ... on September 24, 1976.

Id. at 746 (internal citations omitted).

not apply to the District of Columbia. And, in *Carter*, the Supreme Court was faced with deciding whether the plaintiff could assert a civil rights claim against the District of Columbia's Metropolitan Police Department under 42 U.S.C. § 1983.409 U.S. 418. Holding "that the District of Columbia is not a 'State or Territory' within the meaning of § 1983," the Court stated:

> Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved. Indeed, such '(w)ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well the context, the purposes of the law, and the circumstances under which the words were employed.'

Id. at 420 (citations omitted).

In reviewing challenges to the District of Columbia's Firearms Control Regulations Act, the local courts have assumed that the Second Amendment applies to the District of Columbia. For example, in *Sandidge v. United States*, 520 A.2d 1057 (D.C. 1987), the District of Columbia Court of Appeals concluded that "assuming the second amendment applies to the District of Columbia, we hold it affords appellant no protection whatsoever since congressionally approved criminal law does

not interfere with any government-created right to keep and bear arms." *Id.* at 1058. In his concurring opinion in *Sandidge*, Judge Nebeker stated:

> I write separately to state my conclusion that the second amendment does not apply to the seat of national government. This amendment is to ensure 'the security of a free State.' State militias were essential to that end - - hence, the amendment. Nothing suggests that the founders were concerned about 'free territories,' 'free protectorates' or a 'free Seat of Government of the United States.' Indeed clause 17 gives to Congress exclusive legislative power in all cases over such 'District.' It may fairly be said that a federal militia is available in such places. Therefore, whatever may be said for the second amendment and its reach within the several states, I conclude first that it does not apply to the Seat of Government of the United States.

Id. at 1059 (Nebeker, J., concurring). This Court agrees with Judge Nebeker and therefore concludes that the Second Amendment does not apply to the District of Columbia.

As fully set forth above, the intent of the framers of the Second Amendment was to ensure the efficiency of state militias so they could protect the "security of a free State ...." U.S. Const. amend. II. Because this Court must look to the "character and aim" of the Second Amendment to determine whether it was intended for the District of Columbia to fall within the ambit of the Amendment, *see Carter*, 409 U.S. at 420, the aforementioned discussion of the Second Amendment's

scope was a necessary predicate. And, as the Court explained above, the Second Amendment was included in the Bill of Rights to ensure that the people would have the ability to defend themselves against a potentially oppressive federal government, which had just been given the authority to maintain a national standing army in Article I of the Constitution. But, the drafters of the Constitution having provided for a "District ... [to] become the Seat of the Government of the United States," U.S. Const. Art. I, § 8, cl. 17, and having given Congress "exclusive" authority both to legislate over this District *and to exercise control over "the Erection of Forts, Magazines, [and] Arsenals ...," id.* (emphasis added), surely it was not intended for the protection afforded by the Second Amendment to apply to an entity that had been created to house the national seat of government. In other words, there is no reason to believe that the First Congress thought that the federal seat of government needed to be protected from itself when the Second Amendment was adopted. *See Silveira*, 312 F.3d at 1076-86 (discussing the concerns that led the First Congress to enact the Second Amendment).

Interestingly, even the *Emerson* Court began its analysis of the judicial history of Second Amendment jurisprudence by citing the Supreme Court's decision in *Cruikshank*, which had held that the Second Amendment "is one of the amendments that has no other effect than to restrict the powers of the National Government." *Emerson*, 270 F.3d at 221-22 n.13 (quoting *Cruikshank*, 92 U.S. at 553). In addition, the Fifth Circuit acknowledged that subsequent Supreme Court cases have reaffirmed the *Cruikshank* holding. *Id.* (citing *Miller v. Texas*, 153 U.S. 535 (1894) (holding that with respect to "the second and fourth amendments" that "the restrictions of these amendments operate only upon the federal power, and have no

reference whatever to proceedings in state courts"); *Presser*, 116 U.S. 252 (finding that the Second "amendment is a limitation only upon the power of congress and the national government, and not upon that of the state.")). However, the *Emerson* Court, in an effort to mitigate the significance of rather strong language by the Supreme Court that this Court construes as inconsistent with the conclusion reached by the Fifth Circuit, concluded:

> As these holdings [*Cruikshank*, *Presser* and *Miller*] all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and as they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing any of the issues now before us.

270 F.3d at 222 n.13. In any event, while the Fifth Circuit had to cast a shadow on the current viability of Supreme Court precedent that have commented on the scope of the Second Amendment to reach the conclusion that the Second Amendment protects an individual right to possess firearms, the *Emerson* Court's assessment is of no moment here because, as noted above, the Fourteenth Amendment does not apply to the District of Columbia. *Bolling*, 347 U.S. 497. Accordingly, this Court concludes that the District of Columbia is not a state within the meaning of the Second Amendment and therefore the Second Amendment's reach does not extend to it. Thus, even if this Court were to find that there was support for the

proposition that the Second Amendment protects the right of individual state militia members to possess firearms (i.e., the "limited individual rights" or "sophisticated collective rights" model), because the Court concludes that the District of Columbia is not a state for Second Amendment purposes, plaintiff Hailes would not have standing to challenge D.C. Code § 7-2507.02 based on her association with a District of Columbia militia.

(ii) Does the Second Amendment Apply to the Plaintiff in this Case?

Finally, the Court notes that even if it could conclude that the Second Amendment applies to the District of Columbia, plaintiff Hailes would nonetheless be unable to assert that she has a right to possess her firearm in her residence in the manner in which she desires (*i.e.*, assembled and without a trigger lock) because she has failed to assert any form of association with a militia. *See Silveira*, 312 F.3d at 1060 (describing the school of thought that limits the right to bear arms as conditioned on membership in a militia as the "limited individual rights" model); *Emerson*, 270 F.3d at 219 (describing this school of thought as the "sophisticated collective rights" model). A brief review of the history of the militia is a necessary predicate to addressing why Ms. Hailes is unable to assert a right to possess her firearm without restrictions under the limited individual rights or sophisticated collective rights models.

In *Perpich*, the Supreme Court explained that

> [i]n 1792, [Congress] pass[ed] a statute that purported to establish 'an Uniform Militia throughout the United States,' but its detailed

> command that every able-bodied male citizen between the ages of 18 and 45 be enrolled therein and equip himself with appropriate weaponry was virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force. The statute was finally repealed in 1901. It was in that year that President Theodore Roosevelt declared: 'Our militia law is obsolete and worthless.'

496 U.S. at 341 (quoting First Annual Message to Congress, Dec. 3, 1901, 14 Messages and Papers of the Presidents 6672). Following President Roosevelt's observations, Congress passed the

> Dick Act[, which] divided the class of able-bodied male citizens between 18 and 45 years of age into an 'organized militia' to be known as the National Guard of the several States, and the remainder of which was then described as the 'reserve militia,' and which later statutes have termed the 'unorganized militia.'

Id. at 342-43 & n.11 (citing 32 Stat. 775 (1903)). Specifically, the Dick Act provides

> [t]hat the militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia ... who is more than eighteen and less than forty-five years of age, and shall be divided into two

> classes - - the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia ... and the remainder to be known as the Reserve Militia.

Id. (quoting 32 Stat. 775 (1903)). The Supreme Court commented that "[i]t is undisputed that Congress was acting pursuant to the Militia Clauses of the Constitution in passing the Dick Act." *Id.* at 342.

The District of Columbia has a unique statutory organizational scheme for its militia. Section 49-401 of the District of Columbia Code provides that:

> Every able-bodied male citizen resident within the District of Columbia, of the age of 18 years and under the age of 45 years, excepting persons [exempt by the general laws of the United States], and idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous crime, shall be enrolled in the militia ....

D.C. Code § 49-401 (2001). And section 49-406 of the District of Columbia Code provides: "The organized militia shall be composed of volunteers, and shall be designated the National Guard of the District of Columbia." D.C. Code § 49-406 (2001). Pursuant to these provisions, presumably all District of Columbia male residents who have not volunteered for the National Guard and satisfy the qualifications of D.C. Code § 49-401 comprise the unorganized or reserve militia. What is unique about the District of Columbia militia statutory scheme is that while the Constitution's Militia Clauses establish dual control over the states' militias, as they were to be "essentially

organized and under control of the states, but subject to regulation by Congress and to 'federalization' at the command of the President [,]" *Silveira*, 312 F.3d at 1070, the District of Columbia Code vests control of the District of Columbia's organized militia (*i.e.*, the national guard) almost exclusively with the Executive Branch of the federal government. Section 49-409 of the District of Columbia Code provides that "[t]he President of the United States shall be the Commander-in-Chief of the militia of the District of Columbia." D.C. Code § 49-409 (2001). The President of the United States, as Commander-in-Chief of the militia, "shall ... appoint [] ... a Commanding General of the militia of the District of Columbia with the rank of brigadier general, or major general, who shall hold office until his successor is appointed and qualified, but may be removed at any time by the President." D.C. Code § 49-301(a) (2001). This "Commanding General of the militia of the District of Columbia shall be considered to be an employee of the Department of Defense, and of the United States ...." D.C. Code § 49- 301(b). In addition, section 49-405 of the District of Columbia Code provides that the Commander-in-Chief has the authority to "call out any portion of the enrolled militia" as necessary and "may assign them to existing organizations of the active militia, or may organize them as the exigencies of the occasion may require." D.C. Code § 49-405 (2001). Moreover, it is significant that section 49-103 of the District of Columbia Code provides that

> When there is in the District of Columbia a tumult, riot, mob, or a body of men acting together by force with attempt to commit a felony or to offer violence to persons or property, or by force or violence to break and

> resist the laws, or when such tumult, riot, or mob is threatened, it shall be lawful for the Mayor of the District of Columbia ... to call on the Commander-in-Chief to aid them in suppressing such violence and enforcing the laws ...."

D.C. Code § 49-103 (2001). Finally, section 49-201 of the District of Columbia Code states that

> [e]very organization of the National Guard shall be provided with such ordnance and ordnance stores, clothing, camp and garrison equipage, quartermaster's stores, medical supplies, and other military stores, as may be necessary for the proper training and instruction of the force and for the proper performance of the duties required under this chapter. Such property shall be issued from the stores and supplies appropriated for the use of the Army, upon the approval and by the direction of the Secretary of the Army, to the Commanding General, upon his requisitions for the same. The property so issued shall remain and continue to be the property of the United States, and shall be accounted for by the Commanding General at such times, in manner, and on such forms as the Secretary of the Army may require.

D.C. Code § 49-201 (2001). Thus, from these District of Columbia Code provisions, it is apparent that the organized militia of the District of Columbia, which is organized, armed,

and controlled by the President of the United States, is essentially a component of the federal government.

In this case, Ms. Hailes does not assert in her Complaint or in her written response to a question on this issue posed by the Court during oral argument on the motions currently before the Court, that she is a member of either the organized or reserve militias of the District of Columbia. Aside from her failure to plead standing based on her association with either of the militias, the record is devoid of any evidence that she is able to satisfy the essential elements to claim membership in the reserve militia of the District of Columbia.[22] *See* D.C. Code § 49-401. In any event, because she has the burden of establishing that the Court has jurisdiction, *see Grand Lodge of Fraternal Order of Police*, 185 F. Supp. 2d at 13-14, and as she has failed to assert that she is a member of either the organized or reserve militias of the District of Columbia, she certainly cannot claim that the Second Amendment protects her right to possess her firearm without the requirements imposed by D.C. Code § 7-2507.02 because its possession is related to her association with a militia.

IV. Conclusion

For the aforementioned reasons, this Court finds that the plaintiffs' challenges to sections 7-2502.02 and 22-4504(a) of the District of Columbia Code are non-justiciable due to the plaintiffs' lack of standing to make these challenges and the

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[22]The Court does not express an opinion on the constitutionality of this provision, as Ms. Hailes has not challenged D.C. Code § 49-401 on gender discrimination grounds.

challenges not being ripe for adjudication.[23] On the other hand, the Court finds that plaintiff Hailes' challenge to the requirement that she maintain a trigger lock on her shotgun is legally distinct from the plaintiffs' other claims and therefore the Court had to analyze the scope and purpose of the Second Amendment to determine whether the D.C. Code § 7-2507.02 is unconstitutional. Having done so, the Court finds that Ms. Hailes' Second Amendment challenge to D.C. Code § 7-2507.02 must also be dismissed, as the text of the Second Amendment, the history surrounding its enactment and Supreme Court precedent that have addressed the Amendment all lead the Court to the conclusion that Ms. Hailes' claims are not only lacking on the merits, but that the Second Amendment does not apply to the District of Columbia. Accordingly, the Court will dismiss this case.

SO ORDERED this 29th day of January, 2004.

EGGIE B. WALTON

United States District Judge

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[23]The Court notes that all the reasons expressed herein with respect to why plaintiff Hailes does not have standing to make a Second Amendment challenge to D.C. Code § 7-2507.02 would equally be applicable to why all of the plaintiffs also do not have standing to make a Second Amendment challenge to D.C. Code § 7-2502.02 and § 22-4504(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

UNITED STATES CONSTITUTION

Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

UNITED STATES CODE

42 U.S.C. §1981(a)

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

DISTRICT OF COLUMBIA CODE

§ 1-303.43. Regulations relative to firearms, explosives, and weapons

The Council of the District of Columbia is hereby authorized and empowered to make, and the Mayor of the

District of Columbia is hereby authorized and empowered to enforce, all such usual and reasonable police regulations, in addition to those already made under §§ 1-303.01 to 1-303.03 as the Council may deem necessary for the regulation of firearms, projectiles, explosives, or weapons of any kind in the District of Columbia.

§ 7-2502.01. Registration requirements

(a) Except as otherwise provided in this unit, no person or organization in the District of Columbia ("District") shall receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device, and no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm. A registration certificate may be issued:

(1) To an organization if:

(A) The organization employs at least 1 commissioned special police officer or employee licensed to carry a firearm whom the organization arms during the employee's duty hours; and

(B) The registration is issued in the name of the organization and in the name of the president or chief executive officer of the organization;

(2) In the discretion of the Chief of Police, to a police officer who has retired from the Metropolitan Police Department; or

(3) In the discretion of the Chief of Police, to the Fire Marshal and any member of the Fire and Arson Investigation Unit of the Fire Prevention Bureau of the Fire Department of the District of Columbia, who is designated in writing by the

Fire Chief, for the purpose of enforcing the arson and fire safety laws of the District of Columbia.

(b) Subsection (a) of this section shall not apply to:

(1) Any law enforcement officer or agent of the District or the United States, or any law enforcement officer or agent of the government of any state or subdivision thereof, or any member of the armed forces of the United States, the National Guard or organized reserves, when such officer, agent, or member is authorized to possess such a firearm or device while on duty in the performance of official authorized functions;

(2) Any person holding a dealer's license: Provided, that the firearm or destructive device is:

(A) Acquired by such person in the normal conduct of business;

(B) Kept at the place described in the dealer's license; and

(C) Not kept for such person's private use or protection, or for the protection of his business;

(3) With respect to firearms, any nonresident of the District participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction; provided, that such person, whenever in possession of a firearm, shall upon demand of any member of the Metropolitan Police Department, or other bona fide law enforcement officer, exhibit proof that he is on his way to or from such activity, and that his possession or control of such firearm is lawful in the jurisdiction in which he resides: Provided further, that such weapon shall be unloaded, securely wrapped, and carried in open view.

§ 7-2502.02. Registration of certain firearms prohibited

(a) A registration certificate shall not be issued for a:

(1) Sawed-off shotgun;

(2) Machine gun;

(3) Short-barreled rifle; or

(4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours or to a police officer who has retired from the Metropolitan Police Department.

(b) Nothing in this section shall prevent a police officer who has retired from the Metropolitan Police Department from registering a pistol.

§ 7-2507.02 Firearms required to be unloaded and disassembled or locked

Except for law enforcement personnel described in § 7-2502.01(b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

§ 7-2507.06. Penalties

Any person convicted of a violation of any provision of this unit shall be fined not more than $ 1,000 or imprisoned for not more than 1 year, or both; except that:

(1) A person who knowingly or intentionally sells, transfers, or distributes a firearm, destructive device, or ammunition to a person under 18 years of age shall be fined not more than $ 10,000 or imprisoned for not more than 10 years, or both.

(2) (A) Except as provided in subparagraph (B) of this paragraph, any person who is convicted a second time for possessing an unregistered firearm shall be fined not more than $ 5,000 or imprisoned not more than 5 years, or both.

(B) A person who in the person's dwelling place, place of business, or on other land possessed by the person, possesses a pistol, or firearm that could otherwise be registered, shall be fined not more than $ 1,000 or imprisoned not more than 1 year, or both.

§ 22-4504. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515, except that:

(1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia

law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than $ 5,000 or imprisoned for not more than 5 years, or both; or

(2) If the violation of this section occurs after a person has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or another jurisdiction, the person shall be fined not more than $ 10,000 or imprisoned for not more than 10 years, or both.

(b) No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence.

§ 22-4515. Penalties

Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than $ 1,000 or imprisonment for not more than 1 year, or both.

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No. 05-365

In the Supreme Court of the United States

SANDRA SEEGARS, ET AL., PETITIONERS

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 396 F.3d 1248. The opinion of the district court (Pet. App. 32a-117a) is reported at 297 F. Supp. 2d 201.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2005. A petition for rehearing was denied on June 21, 2005 (Pet. App. 21a-30a). The petition for a writ of certiorari was filed on September 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, the City Council of the District of Columbia enacted the Firearms Control Regulation Act of 1975, D.C. Code §§ 7-2502.01 *et seq.* (2001). One provision of the Act prohibits a person from possessing a firearm in the District of Columbia unless the individual holds a valid registration certificate. *Id.* § 7-2502.01. Another provision prohibits the registration of pistols that were not already registered before September 24, 1976, the effective date of the Firearms Control Regulations Act. *Id.* § 7-2502.02(a)(4). A third provision requires registrants to "keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia." *Id.* § 72507.02.

Under the Act, an applicant for a registration certificate must file an application "prior to taking possession of a firearm from a licensed dealer or from any person or organization holding a registration certificate therefor." D.C. Code § 7-2502.06(a) (2001). But "[i]n all other cases, an application for registration shall be filed immediately after a firearm is brought into the District." *Ibid.* If the Chief of Police denies an application, an individual has the right to seek reconsideration of the decision. *Id.* § 7-2502.10(a). Upon receipt of the Chief of Police's "final decision," an applicant may seek review under the District of Columbia Administrative Procedure Act. *Id.* §§ 7-2502.10(b), 7-2507.09. Such review culminates in judicial review of the Chief of Police's decision in the District of Columbia Court of Appeals, *id.* § 7-2502.10(b); *id.* § 2-510(a), where the individual may

challenge the constitutionality of the Chief's decision, *id* § 2-510(a)(3)(B); see *Fesjian* v. *Jefferson*, 399 A.2d 861 (D.C. 1979). Within seven days of a final decision upholding the denial of a registration certificate, the applicant must "[l]awfully remove such firearm from the District for so long as he has an interest in such firearm," or "[o]therwise lawfully dispose of his interest in such firearm." D.C. Code § 7-2502.10(c)(2) and (3) (2001).

Possession of an unregistered firearm may be punished by a fine of up to $1000 or imprisonment of up to one year. D.C. Code § 7-2507.06 (2001). A second offense is punishable by a fine of $5000 or five years of imprisonment. *Id.* § 7-2507.06(2)(A). Failure to keep a firearm disassembled or bound by a trigger lock is punishable by a fine of up to $1000 or imprisonment for up to one year. *Id.* § 7-2507.06.

The District of Columbia has licensing requirements for pistols that are distinct from the registration requirements. D.C. Code § 22-4506 (2001) authorizes the Chief of Police to issue licenses to certain persons to carry a pistol if "if it appears that the applicant has good reason to fear injury to his or her person or property or has any other proper reason for carrying a pistol." However, an applicant for a license must "register the pistol for which the license will apply." D.C. Mun. Regs. tit. 24, § 2304.15 (2004).

Carrying an unlicensed pistol in one's dwelling is punishable by a fine of up to $1000 or imprisonment for up to one year. D.C. Code § 22-4504(a)(1) (2001); *id.* § 22-4515. A person who carries an unlicensed pistol outside his or her dwelling, place of business, or other land owned by the person is subject to a fine of up to $5000 or imprisonment of up to five years. *Id.* § 22-4504(a)(1). The penalty increases to a fine of up to

$10,000 or imprisonment for up to ten years for a second offense. *Id.* § 22-4504(a)(2). The offense of carrying an unlicensed pistol (*id.* § 22-4504(a)) is a separate offense from possessing an unregistered pistol. *Id.* §§ 7-2502.01, 7-2507.06). See *Tyree* v. *United States*, 629 A.2d 20 (D.C. 1993).

Prosecutorial responsibilities for District of Columbia firearms laws is shared by the Office of the Attorney General for the District of Columbia and the United States Attorney for the District of Columbia. See *United States* v. *Bailey*, 495 A.2d 756, 760 n.10 (D.C. 1985). The Code authorizes the Office of the Attorney General for the District of Columbia—previously known as the Office of the Corporation Counsel for the District of Columbia—to prosecute certain minor crimes, such as violations of municipal ordinances, "in the name of the District of Columbia." D.C. Code § 23-101(a) (2001). The Code directs the United States Attorney for the District of Columbia to prosecute all other crimes, including felonies, "in the name of the United States." *Id.* § 23-101(c).

2. Petitioners are five residents of the District of Columbia. They filed suit in the United States District Court for the District of Columbia against the Attorney General of the United States and the Mayor of the District of Columbia. Pet. App. 32a-33a. Their complaint alleged that the District of Columbia's prohibition against the registration of pistols, its requirement to keep firearms disassembled or bound by a trigger lock, and its prohibition against carrying a pistol without a license in one's dwelling, violated, *inter alia*, the Second Amendment to the United States Constitution. Pet. App. 4a-5a, 32a.

No petitioner claimed that he or she attempted to register a pistol before filing suit. Instead, each alleged that "[b]ut for D.C. Code § 7-2502.02(a)," he or she "would forthwith obtain and register a pistol to keep at home for self protection." C.A. App. 14, 15. Petitioner Hailes further alleged that she possesses a registered shotgun, which she keeps at home bound by a trigger lock, and that, "[b]ut for D.C. Code § 7-2507.02, she would remove the trigger lock when she deems it necessary to defend herself in her home." *Id.* at 15. Petitioners did not allege that they have been prosecuted or threatened with prosecution under the provisions they challenge. Instead, they alleged that they "face arrest, prosecution, and incarceration should they possess an unregistered pistol in violation" of the D.C. Code. C.A. App. 15-16 (alleging that petitioner Hailes would be subject to prosecution were she not to keep her shotgun disabled).

The United States moved to dismiss petitioners' complaints on the ground that petitioners lack standing to challenge the firearms provisions and that their challenges are not ripe. C.A. App. 34. The District of Columbia adopted the United States' justiciability arguments but argued also that petitioners' complaints must be dismissed because, in its view, the Second Amendment does not create an individual right to possess firearms. *Id.* at 29 n.1, 34.[1]

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[1] While the United States did not take a position on the merits of petitioners' claims, it informed the district court of its position that the Second Amendment "protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of

3. The district court dismissed petitioners' claims. The court held that petitioners lack standing to challenge the provisions prohibiting the possession of pistols because they did not allege that they face[] a threat of prosecution under the statute which is *credible and immediate*, and not merely abstract or speculative." Pet. App. 43a (quoting *Navegar, Inc.* v. *United States*, 103 F.3d 994, 998 (D.C. Cir. 1997)).

The court concluded that petitioner Hailes had standing to challenge the trigger lock provision, because she did not have a mechanism for administrative review, culminating in judicial review, to challenge the lawfulness of the trigger lock requirement. Pet. App. 61a-62a. The court rejected petitioner Hailes' Second Amendment claim on the merits, on the ground that "the Second Amendment does not confer an individual right to possess firearms," *id.* at 101a, and that the Second Amendment does not apply to the District of Columbia, because "the District of Columbia is not a state for Second Amendment purposes." *Id.* at 111a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-16a. The court held that petitioners had not established a "threat of prosecution reaching the level of imminence required by" the court of appeals' *Navegar* decision. *Id.* at 13a (pistol petitioners); *id.* at 15a-16a (trigger lock petitioner). In *Navegar*, the court of appeals held that, in order to establish standing to bring a preenforcement challenge to a criminal statue restricting conduct that is arguably constitutionally protected, a plaintiff must show a credi-

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firearms that are particularly suited to criminal misuse." Motion to Dismiss 013 n.11 (quoting Memorandum by the Attorney General included in the government's Br. in Opp. at 19-20 n.3, *United States* v. *Emerson*, 536 U.S. 907 (2002) (No. 01-9780)).

ble threat of imminent prosecution. *Navegar*, 103 F.3d at 998. Under *Navegar*, a plaintiff cannot establish such a threat merely by showing that the law is generally enforced. *Id.* at 1001. Rather, under *Navegar*, plaintiffs must demonstrate "prior threats against them or [other] characteristics indicating an especially high probability of enforcement against them." Pet. App. 13a. The court of appeals concluded that none of the petitioners had made such a showing. *Id.* at 13a-15a.

Judge Sentelle dissented. Pet. App. 16a-20a. In his view, because petitioners had shown that their intended behavior is covered by a criminal statute that is generally enforced, they satisfied the standard for alleging a credible threat of enforcement set forth in *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). Pet. App. 16a-18a. Judge Sentelle also concluded that while *Babbitt* involved a First Amendment claim, the same standard should apply to Second Amendment claims. *Id.* at 18a-19a.

5. The court of appeals denied the petition for rehearing en banc. Pet. App. 23a-24a. Three judges filed statements concerning the order denying rehearing en banc. Chief Judge Ginsburg concurred in the denial of rehearing en banc. He concluded that the pistol petitioners did not satisfy the standards for bringing a preenforcement challenge to a criminal statute. He reasoned that because petitioners could have sought to register pistols and then challenged the subsequent denial of their applications in the courts of the District of Columbia, this case "does not present a circumstance in which a plaintiff is 'required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.* at 26a (quoting *Babbitt*, 442 U.S. at 298). Chief Judge Ginsburg further concluded that petitioner Hailes

lacked standing to challenge the trigger lock requirement, because "it is highly speculative" whether "she would ever find it necessary to remove the trigger lock in order to defend herself in her home," and whether "she would then be prosecuted for that action." *Id.* at 26a-27a.

Judge Williams expressed the view that the pistol petitioners had established a sufficiently imminent threat of prosecution to establish standing because the D.C. Code "unequivocally" bars issuance of permits for pistols. Pet. App. 28a. Judge Williams also concluded that petitioner Hailes had established standing, because "[t]he risk of prosecution in the event of the contingency [Hailes] fears is high." *Id.* at 29a. Judge Sentelle largely agreed with Judge Williams' reasoning. *Id.* at 27a.

ARGUMENT

The court of appeals correctly held that petitioners failed to satisfy the standards for bringing a preenforcement challenge to a criminal statute. The court's decision does not conflict with any decision of this Court or any other courts of appeals. Review by this Court is therefore not warranted.

1. Petitioners contend (Pet. 7) that the decision below conflicts with *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). In particular, they argue that the court of appeals failed to follow *Babbit*'s holding that "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await a criminal prosecution as the sole means of seeking relief." *Id.* at 298.

The court of appeals, however, did not depart from that holding. Instead, applying its previous decision in *Navegar* v. *United States*, 103 F.3d 994 (D. C. Cir. 1997), the court concluded that petitioners failed to establish a credible threat of prosecution as required by *Babbitt*. As the court explained, *Navegar* held that, in order to establish a credible threat of prosecution, a plaintiff must show either that he was threatened with prosecution or that he has a characteristic that puts him at a heightened risk of prosecution, and petitioners failed to make either showing. Pet. App. 13a.

Petitioners argue (Pet. 11) that, under *Babbitt*, a plaintiff can demonstrate a credible threat of prosecution by showing that he intends to engage in conduct that violates the statute and that the government maintains a general intent to enforce the statute. But *Babbitt* did not purport to hold that a such a showing would always enable a plaintiff to establish that he faces a sufficiently credible threat of prosecution to justify a preenforcement challenge to a criminal statute. *Babbitt* involved a First Amendment claim, and what is sufficient to satisfy the credible threat requirement in that context is not necessarily sufficient in other contexts. Indeed, in *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965), the Court expressly held that preenforcement challenges to criminal statutes on First Amendment grounds involve distinct considerations because "free expression" has a "transcendent value to all society, and not merely to those exercising their rights."

In any event, even if petitioners could satisfy *Babtitt*'s credible threat requirement, that would not make their preenforcement challenge justiciable. *Babitt* authorizes a preenforcement challenge to a criminal statute only when "await[ing] criminal prosecution" is

"the sole [alternative] means of seeking relief." 442 U.S. at 298. Petitioner failed to satisfy that independent requirement here. As Chief Judge Ginsburg correctly observed in his opinion concurring in the denial of rehearing en banc, petitioners had a ready means for seeking relief with respect to the pistol prohibition without awaiting criminal prosecution. They could have applied to register a pistol with the Chief of Police and then challenged the subsequent denial in the District of Columbia Court of Appeals. Pet. App. 26a; see D.C. Code §§ 2-510(a), 7-2502.10(b), 7-2507.09 (2001); *Fesjian* v. *Jefferson*, 399 A.2d 861 (D.C. 1979) (considering constitutional challenges to District gun statute upon appeal from denial of registration). And if that court issued an adverse decision, petitioners could seek a petition for a writ of certiorari from this Court. 28 U.S.C. 1257. The existence of that alternative avenue for review also renders their claim here unripe and furnishes an independent basis for a court to withhold the equitable relief petitioners seek.

Petitioners argue (Pet. 22) that the existence of that alternative remedy is not relevant because they have sued under 42 U.S.C. 1983, and exhaustion of administrative remedies is not a prerequisite to such suits. But Section 1983 does not create a cause of action against federal officials acting under color of federal law. *Wheeldin* v. *Wheeler*, 373 U.S. 647, 650 & n.2 (1963). And when the United States Attorney prosecutes District firearms violations, he is a federal official acting under color of federal law. See Act of July 29, 1970, Pub. L. No. 91-358, § 210(a), 84 Stat. 604 (D.C. Code § 23-101 (2001)) (authorizing the United States Attorney to prosecute such offenses "in the name of the United States").

Petitioners' suit against the Mayor of the District of Columbia arises under Section 1983. But nothing in Section 1983 eliminates the established rule that a plaintiff may not bring a preenforcement challenge to a criminal statute when there is an alternative way to challenge the law without awaiting criminal prosecution. The existence of an alternative mechanism to challenge the law is relevant to the ripeness analysis, which is distinct from principles of exhaustion. Petitioners' reliance on Sectior 1983 is therefore misplaced.

Petitioners also argue (Pet. 3) that they should not be required to invoke a futile administrative remedy. But that assertion of futility ignores the availability of judicial review for their claims in the District of Columbia Court of Appeals.[2]

2. Petitioners contend (Pet. 7, 15-18) that the decision below conflicts with the Sixth Circuit's decision in *Peoples Rights Organization, Inc.* (*PRO*) v. *Columbus*, 152 F.3d 522 (1998). There is, however, no conflict.

In *PRO*, plaintiffs brought a preenforcement challenge to a provision of the Columbus City Code that prohibited the possession and sale of assault weapons. The plaintiffs alleged that they could not determine whether weapons they owned were "assault weapons" within the meaning of the ordinance, and that the ordinance was

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[2] For the same reason, petitioners' reliance (Pet. 22) on *Bach* v. *Pataki*, 408 F.3d 75 (2d Cir. 2005), is misplaced. In that case, the court held that a plaintiff did not have to file a futile application for a license before bringing a preenforcement challenge to a gun licensing statute. But the court in that case focused solely on the absence of a viable administrative remedy. *Id.* at 83. It did not address the question whether the availability of judicial review of the denial of a licence would serve as an adequate alternative remedy.

therefore unconstitutionally vague. 152 F.3d at 526, 528. The Sixth Circuit held that, based on the city's representation "that it fully intends to prosecute anyone who violates the provisions of the ordinance," *id.* at 529, the plaintiffs had alleged a sufficient threat of prosecution to confer standing, *id.* at 530. But in so holding, the Sixth Circuit expressly distinguished its prior decision in *National Rifle Ass'n* v. *Magaw*, 132 F.3d 272 (1997). In that case, the Sixth Circuit held that plaintiffs lacked standing to challenge federal gun legislation because they merely expressed the "desire" and "wish" to engage in certain possibly prohibited activities, but were "restrained" and "inhibited" from doing so by the federal legislation. *Id.* at 293.

Petitioners here are more like the plaintiffs in *Magaw* than like the plaintiffs in *PRO*. Petitioners do not allege that they presently own pistols within the District. They have alleged only a desire or wish to possess pistols and claim to be restrained from doing so by the District's prohibition. C.A. App. 14, 15. There is therefore no conflict between the D.C. and Sixth Circuits on the question presented here.

This case is distinguishable from *PRO* in another important respect. As discussed above, petitioners have an alternative way to challenge the laws at issue without violating them and risking criminal punishment. By contrast, the plaintiffs in *PRO* had no apparent means of obtaining a judicial determination of their claims, other than by undergoing a criminal prosecution. See 152 F.3d at 530. For that reason as well, the Sixth Circuit's decision in *PRO* provides no assistance to petitioners here.

3. As petitioners note (Pet. 23), there is no administrative process that would permit petitioner Hailes to

challenge the trigger lock requirement. Petitioner Hailes' claim is not justiciable, however, because it is too speculative to satisfy standing and ripeness requirements.

In order to have standing, a plaintiff bringing suit to prevent a future injury must show that the injury is "imminent" or "certainly impending." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990). "Allegations of possible future injury do not satisfy the requirements of Art. III." *Ibid.* In addition, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (citation omitted).

Under those standards, petitioner Hailes has failed to establish standing and ripeness. Rather than alleging an imminent harm, she alleges only that she currently possesses a registered shotgun in her home, C.A. App. 14-15, and that, "[b]ut for D.C. Code § 7-2507.02, she would remove the trigger lock when she deems it necessary to defend herself in her home." *Id.* at 15. That chain of events is too speculative to satisfy standing or ripeness requirements.

Petitioner Hailes' alleged injury is speculative for another reason. Even if the chain of events petitioner Hailes identifies were to occur, it is entirely speculative whether a prosecutor would bring criminal charges against her. See *Blanchette* v. *Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 143 n.29 (1974). Indeed, if petitioner Hailes were to use her shotgun in self-defense, she would likely have a defense to any criminal charge. See *Wilson* v. *United States*, 198 F.2d 299, 300 (D.C. Cir. 1952) (holding that, though not expressly provided

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IN THE

Supreme Court of the United States

SANDRA SEEGARS, GARDINE HAILES, ABSALOM F. JORDAN, JR., CARMELA B. BROWN, AND ROBERT N. HEMPHILL,
Petitioners,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, AND ANTHONY A. WILLIAMS, MAYOR, DISTRICT OF COLUMBIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

1. For the United States, the courthouse door is closed to declaratory judgment actions by law-abiding persons, and is open only to persons who recklessly flaunt the law to the extent that specific law enforcement officers have informed them that their arrest and prosecution are imminent. Whale watchers and profit seekers have standing, but prudent persons who seek to provide for their security from criminal attack do not.

2. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), held:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973).

The United States appears to assume that the term "a credible threat of prosecution" is limited to a threat arising out of a current violation by the plaintiffs known to the police – why else would one be directly "threatened with prosecution" or have "a characteristic that puts him at a heightened risk of prosecution." Opposition 9. This assumes that the plaintiffs must violate a criminal statute to obtain standing in a civil case – a curious result given that the issues in that situation would be litigated in an actual criminal prosecution. The term "a credible threat of prosecution" must include the situation here, *i.e.*, plaintiffs will do what the law expressly forbids, but to avoid actual prosecution will do so only when a court invalidates the law – and at that point will incontestably do so

"forthwith." This is the kind of case the Declaratory Judgment Act is designed to accommodate.

Doe v. *Bolton*, *supra*, makes plain that the United States, and the court of appeals, have a too cramped view of what is a "credible threat of prosecution." In *Doe*, the physician-appellants alleged only that "the Georgia statutes 'chilled and deterred' them from practicing their respective professions and deprived them of rights guaranteed by the First, Fourth, and Fourteenth Amendments." 410 U.S. at 186.

They did not allege that law enforcement officers had informed them that their arrest and prosecution are imminent. This Court nonetheless concluded that:

> the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Id. at 188.

Doe went on to explain that Georgia's statute "is recent and not moribund" and "is the successor to another Georgia abortion statute under which, we are told, physicians were

prosecuted." *Id.* at 188-189.[1]

The same is true here. While none of the Petitioners has been prosecuted, or directly threatened with prosecution, they are the ones against whom these criminal statutes directly operate. They thus assert a sufficiently direct threat of personal detriment and should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Babbitt rejected the argument that standing did not exist because the criminal penalty had not been (and might never be) applied. The determining criteria were that "the State has not disavowed any intention of invoking the criminal penalty provision," and that the fear of prosecution was not "imaginary or wholly speculative." 442 U.S. at 302.

Similarly, *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 393 (1988), concluded that "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." The law would be so enforced, in other words, *if* plaintiffs violated the law. Instead of violating the law, plaintiffs sought a declaratory judgment. Here, plaintiffs also have "an actual and well-founded fear" that the law would be enforced against them if they disobeyed it. They choose not to disobey the law to preclude an actual prosecution and to obtain a judgment that would allow them forthwith to do precisely what the law forbids.

The United States seeks to restrict what *Babbitt* calls "conduct arguably affected with a *constitutional interest*," only to conduct protected by the First Amendment. Opposition 9.

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[1] By contrast, *Younger v. Harris,* 401 U.S. 37, 42 (1971), denied standing where certain plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible."

Yet the precedent it cites, *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), also includes broader language, such as the need to "assure adequate vindication of constitutional rights." *Id.* at 485. Referring to laws with "an overbroad sweep" – which surely applies here – *Dombrowski* stated: "The assumption that defense of a criminal prosecution will generally assure ample vindication of *constitutional rights* is unfounded in such cases." *Id.* at 486 (emphasis added).[2]

Petitioners properly allege "conduct arguably affected with a constitutional interest" in their claim that the prohibitions at issue infringe on "the right of the people to keep and bear arms" guaranteed by the Second Amendment to the U.S. Constitution. While the United States does not take a position on the merits, it agrees that the Second Amendment "protects the rights of individuals . . . to possess and bear their own firearms." Opposition 5 n.1. Consistent therewith, Congress only authorized the District to pass "usual and reasonable police regulations . . . necessary for the regulation of firearms," D.C. Code § 1-303.43, not to ban an entire class of firearms from possession by law-abiding citizens.

3. The United States argues that plaintiffs lack standing since they could have pursued this litigation in the District's court system rather than in Federal court. Opposition 10. Yet this Court has never held that a party lacks standing in one court if suit could have been filed in another court. In civil rights litigation, one generally has the option of filing either in

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[2] The relaxed rule of standing recognized by *Dombrowski* in First Amendment cases was waiver of the "requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Id.* Petitioners here make no such argument.

Federal or State court. The fact that a State court (or a D.C. court) could rule on a constitutional issue does not imply that plaintiffs lack standing to litigate that issue in the Federal court.[3]

4. The United States argues that, since no cause of action exists against the United States under 42 U.S.C. § 1983, it is not subject to the rule that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516 (1982). Opposition 10. But § 1983 does apply to District ordinances,[4] and *Patsy* teaches that exhaustion of administrative remedies is not required. It would be curious if plaintiffs were not required to exhaust administrative procedures as to the District defendant, but would be required to exhaust them as to the Federal defendant. At any rate, the argument confuses rules of standing with rules about causes of action.[5]

The United States argues that plaintiffs must pursue a futile administrative remedy and then appeal to the District's courts for relief. Opposition 11 & n.2. It suggests that the

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[3] *Baggett v. Bullitt*, 377 U.S. 360, 366 (1964) (reversing lower court holding that "although the challenge raised a substantial constitutional issue, adjudication was not proper in the absence of proceedings in the state courts which might resolve or avoid the constitutional issue").

[4] *See* 42 U.S.C. § 1983 (imposing liability on "Every person who, under color of any . . . ordinance . . . of . . . the District of Columbia, subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws").

[5] *See Steffel v. Thompson*, 415 U.S. 452, 475 (1974) ("we do not require petitioner first to seek vindication of his federal rights in a state declaratory judgment action").

holding to the contrary in *Bach v. Pataki*, 408 F.3d 75, 82 (2nd Cir. 2005), focused only on the futility of an administrative remedy without regard to a possible judicial remedy. Yet *Bach* cites numerous decisions by New York courts stemming from judicial review of denials of licenses to carry firearms. *Id.* at 79-82. Immediately following that discussion, the court held that "Bach's failure to file a license application does not pose an obstacle to consideration of his claims." *Id.* at 82.

Bach was hardly oblivious to the issue being whether one must apply and get denied and then seek judicial review, or bypass a futile application and file suit. It held that the former served no purpose:

> Imposing a filing requirement would force Bach to complete an application for which he is statutorily ineligible and to file it with an officer without authority to review it. "We will not require such a futile gesture as a prerequisite for adjudication in federal court." *Williams v. Lambert*, 46 F.3d 1275, 1280 (2d Cir.1995) . . . . Bach's claims are thus justiciable.

Id.

The above quotation from *Williams* relates directly to the futility of filing a judicial appeal from an adverse administrative decision, because the law would plainly require the court to uphold the denial.[6] Here, because the law clearly bars registration and possession of a pistol, it would be futile to apply to register a pistol and equally futile to seek judicial

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[6] *Williams* states just before the above quotation that the plaintiff "could still file a petition in the New York state courts," but "such a gesture . . . would be a futile one, as her case would be dismissed summarily under the clear language of" the statute. 46 F.3d at 1280.

review of the denial.[7] In the words of Judge Williams, "it is mysterious to me how plodding through the charade of seeking permits would render the threat of prosecution (and thus the need to forego measures for their security) one iota more imminent." App. 28a.

5. The United States argues that no conflict exists between the decision below and *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522, 528-29 (6th Cir. 1998) ("*PRO*"). Opposition 11-12. The court below found that "*PRO* is plainly inconsistent" with its own holding and that "Plaintiffs correctly argue that [*PRO*] supports preenforcement standing in precisely this circumstance." App. 14a.

PRO found standing where plaintiffs "can either possess their firearms in Columbus and risk prosecution under the City's law, or, alternatively, they can store their weapons outside the City, depriving themselves of the use and possession of the weapons." 152 F.3d at 529. That is precisely the dilemma of petitioner Jordan, who would risk prosecution by possessing his pistol in the District, and who is deprived of its use because he must store it outside the District.

The United States argues that plaintiffs here are like those in *National Rifle Ass'n. v. Magaw*, 132 F.3d 272, 293 (6th Cir. 1997), in which "the individual plaintiffs aver that they 'desire' and 'wish' to engage in certain possibly prohibited activities" and had "telephoned BATF agents, submitted a hypothetical question, and received an answer that the questioned activity could subject them to federal prosecution"

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[7] *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-68 (1977) (a person who never applied for a job is entitled to retroactive seniority if he can show that applying would have been a futile gesture because of the employer's pervasive discriminatory hiring practices).

– none of which conferred standing. *Id.* at 293-94. That is a far cry from alleging, as does Jordan, that he actually possesses a banned firearm or, as do Seegars, Brown and Hemphill, that they would forthwith obtain one on a judicial declaration that the law is void.

While the allegedly vague provisions at issue in *NRA v. Magaw* might have been clarified by the agency, in *PRO* "the words of the ordinance provide the sole source of guidance for firearms' owners." *PRO*, 152 F.3d at 530. While the ordinance in *PRO* was vague, the ordinance here is not – it clearly applies to plaintiffs. As the court below observed, the hazard of prosecution is worse here than it was in *PRO*. App. 14a-15a.

6. The United States argues that Ms. Hailes has no standing because it is only speculative that her house will be broken into again, that her life will be threatened, and that she will need to remove the trigger lock from and load her shotgun. Opposition 12-14. Nor does the United States anticipate that she may need to make her shotgun ready if she hears suspicious noises or otherwise reasonably fears an unlawful intrusion.

In matters of security, the United States itself does not take such a carefree attitude. From its building guards and law enforcement agents to air marshals and soldiers, being armed even when no specific threat exists is considered prudent. To dismiss the plight of the lowly homeowner in a crime-ridden neighborhood by depicting such person's legitimate fears as based on "speculation" is unseemly.

Whitmore v. Arkansas, 495 U.S. 149 (1990), does not support the government's position. It held that one death row inmate does not have standing to file a habeas corpus petition on behalf of a second, unrelated death row inmate. The heinous murder in that case is a stark reminder that persons are entitled to take measures to defend themselves against criminal

aggression.[8] This is a prudent, personal choice plaintiffs claim on their own behalf, not on behalf of unrelated third parties.

Indeed, *Whitmore*, *id.* at 158-59, reaffirmed *United States v. SCRAP*, 412 U.S. 669, 678 (1973), which upheld standing for "economic, recreational and aesthetic harm" to students which would allegedly be caused by an increase in use of nonrecyclable commodities. Surely petitioners' interest in protecting their lives fr m criminal violence without being prosecuted and imprisoned for doing so is more substantial than the interests at stake in *SCRAP*.

Texas v. United States, 523 U.S. 296, 300 (1998), involved various contingencies which may never occur. *See id.* at 301 ("Texas is not required to engage in, or to refrain from, any conduct, unless and until it chooses to implement one of the noncleared remedies."). Here, plaintiffs – under pain of imprisonment – are required to refrain from conduct which they deem prudent and necessary to protect their lives.

The United States surmises that it is speculative that Hailes would be prosecuted if caught. Opposition 13, citing *Blanchette v. Conn. General Insurance Corp.*, 419 U.S. 102, 143 n.29 (1974). But *Blanchette* held that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Id.* at 143.

It is no defense to the prohibition that a person is a crime victim seeking to protect herself from attack. *Cf.* Opposition 13-14, citing *Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952). Recent case law makes clear that any such defense is extremely limited. *Yoon v. United States*, 594 A.2d 1056, 1057, 1064 n.16 (D.C. 1991) (upholding conviction

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[8] *See id.* at 157 (the "victim died after he stabbed her 10 times, cut her throat, and carved an 'X' on the side of her face").

of market owner who was repeatedly robbed and shot at). Ms. Hailes seeks to remove such uncertainties, which is the very aim of the Declaratory Judgment Act:

> Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its constitutionality.

Steffel, 415 U.S. at 468 n.18 (citation omitted).

The constricted standing rule advocated by the United States is for reckless people willing to violate the law and take their chances. It is not for prudent people who seek to order their lives to comply with the law in event of irreversible, life-threatening contingencies. As Judge Williams noted about Ms. Hailes: "The risk of prosecution in the event of the contingency she fears is high, and thus the resulting deterrent to her freeing the trigger lock is effectively as great as if she proposed to violate the law down at the police station." (App. 29a)

CONCLUSION

The petition for a writ of certiorari should be granted.

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